UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

COMMERCIAL LEGAL REFORM ASSESSMENT FOR EUROPE AND EURASIA

Workshop Report

from the Workshop held in
Prague, Czech Republic
December 6-8, 1999

USAID Omnibus II-C: Policy/Legal/Training
Contract No. EPE-I-95-00071
Task Order No. EPE-I-09-95-00071-00

December 2000

BOOZ·ALLEN & HAMILTON INC.
INTERNATIONAL CLIENT SERVICE TEAM

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

COMMERCIAL LEGAL REFORM ASSESSMENTS FOR EUROPE AND EURASIA

Revised Development Indicators
CLIR Version 2.1

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BOOZ·ALLEN & HAMILTON INC.
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USAID/EE COMMERCIAL LEGAL REFORM ASSESSMENT FOR EUROPE & EURASIA

Workshop Report

Report on the Results and Outputs of the Regional Workshop

held at

Stirin Castle, The Czech Republic

December 6-8, 1999

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USAID/EE COMMERCIAL LEGAL REFORM ASSESSMENT FOR EUROPE & EURASIA

Workshop Report

I. Executive Summary

Background

In mid-1998, the UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID) contracted Booz·Allen & Hamilton to design a methodology for assessing the level of commercial legal and institutional reform (C-LIR) in transition economies. USAID wanted the diagnostic methodology for its missions to use in determining the level of reform in their countries in order to identify better the areas of need and opportunity for ongoing reform efforts, as well as a way of assessing quickly the work done to date. In addition, the tool needed to be cost-effective, providing sufficient analysis for planning and program purposes at an affordable cost.

Working together, USAID and Booz·Allen created an approach involving seven areas of commercial law across four dimensions. The substantive legal areas were: bankrupcty, collateral, company, competition, contract, foreign direct investment (FDI), and trade. The four dimensions on which to focus the analytical studies were: framework laws; implementing institutions; supporting institutions; and the market for reform. In other words, the diagnostic tool involved a four-dimensional look at each of seven areas of commercial law.

To test and define the methodology, Booz·Allen and USAID performed field studies in four countries chosen for the variations in their levels of development, geographic location, and presumed cultural differences. The countries studied were Kazakhstan, Poland, Romania and Ukraine. Each study was 2-3 weeks in length, performed by a team of three expatriate legal reform specialists with assistance from local lawyers and other local counterparts. The teams prepared separate reports on each country, then compiled the four studies into a synthesis report with comparative findings.

The Workshop

In order to determine the accuracy of the findings, and to validate and refine the methodology of the C-LIR assessments, USAID conducted a three-day workshop on the synthesis report in Prague in December 1999. The workshop was attended by more than 50 legal reform professionals from sixteen foreign countries. They represented USAID missions, local counterparts, the World Bank, MIGA, OECD, IBRD, and the U.S. Federal Trade Commission, and USAID/Washington.

The first day of the Workshop was a peer review session aimed primarily at the methodology. In plenary and breakout sessions, USAID representatives examined the conceptual approach (four dimensions, seven areas of law), examined refinements in the questions used, and tested the conclusions of the reports.

During the second and third days, all participants considered the comparative findings of the reports, and debated methods for and problems in achieving greater impact in legal reform initiatives. The participants analyzed the existence of an "implementation/enforcement gap" in which legal reform projects succeeded in getting quality laws adopted, but could not succeed in getting them effectively implemented or enforced.

Results of the Workshop

The Workshop was generally considered a success in achieving its goals and objectives. Specifically, the following results were obtained:

- *Validation*. Participants agreed with the overall conceptual approach and overall methodology employed in the diagnostic assessments.
- *Confirmation.* Participants felt that the conclusions reached, as expressed in the reports and demonstrated in the C-LIR development indicators, were valid and generally accurate. In one instance -- competition -- some participants felt that the conclusions were generally correct but questioned some of the methodology, suggesting changes that would permit a more accurate analysis.
- *Refinement.* During the peer review, suggestions were made on how the methodology could be refined. These can be characterized as follows:
  - *Framework Laws*. Most suggestions focused on the need for better defined categories of questions, and the elimination or clarification of apparently redundant questions.
  - *Implementing Institutions*. Participants recommended improvements to the approach, with questions more specifically tailored to the different institutions in each area of law. Other discussions centered on the identity of courts and notaries, and whether they should be considered implementing or supporting institutions. Several participants recommended creating separate sections for these, but upon further discussion it was decided to approach them from within each area of law. (It was noted that separate studies were more in the province of judicial reform, and would not give the desired focus at an affordable cost.)
  - *Supporting Institutions.* A number of participants requested a clearer delineation of the types and identities of institutions being discussed.
  - *The Market for Reform*. This area received the fewest direct comments, but was recognized as needing more precise tailoring and editorial structures.

Based on these suggestions, the indicators have been edited and refined to capture the comments and concerns addressed at the workshop. Each framework law section has been expanded slightly and edited heavily to place all questions in within logical categories and eliminate or clarify redundancies. Implementing institutions have been refined to look separately at the organization and operations (performance) of the institutions, and to include sections on the courts and any other secondary institutions with responsibility for implementation. Supporting institutions have been identified and categorized, with more targeted questions addressing their roles. Finally, the market section has been substantially overhauled to better pinpoint areas of market distortions and weaknesses.

The revised indicators contained in this Workshop Report have now been field tested in Croatia, Macedonia and Albania, and again revised to produce a more accurate, effective and reliable diagnostic tool.

II. Workshop Overview

A. Workshop Goals and Objectives

The assessment methodology and development indicators were the subject of a regional workshop held in Prague from December 6 to December 8, 1999. In attendance were highly qualified local experts in commercial law, associated institutions (e.g. courts, registries, bar associations) and other subject matter areas (e.g. foreign trade, banking, SMEs) bearing directly on the topic of commercial law reform. The World Bank, the EBRD, MIGA, OECD, and the FTC were represented. USAID commercial law experts from Washington and throughout the CEE/NIS attended.

The first day, December 6, was devoted to a peer review of indicators by subject-matter experts. The next two days involved all participants and focused on a methodology review and strategies for closing the implementation/enforcement gap.

Throughout the entire workshop, participants discussed and debated country, regional, and subject matter specific findings and conclusions. They explored the root causes of the implementation/enforcement gap and its implications for USAID and other donors.

From the outset the objectives of the workshop were to:

- Validate the conceptual approach (four dimensions, seven areas).
- Consider refinements in the methodology and the development indicators.
- Test the conclusions reached in the four country reports and the synthesis report.
- Suggest alternate models and approaches that might be used to address the "gap."
- Offer suggestions for the next generation of C-LIR activities.

As is apparent from the succeeding sections of this Report, the workshop achieved its objectives. The frank and useful exchange of views is enabling the contractor to refine the concepts in the assessment methodology and development indicators. Insights from experience throughout the region will aid in the design, implementation and evaluation of future C-LIR interventions.

II. Workshop Overview

B. Workshop Agenda

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Monday, December 6, 1999

Peer Review: C-LIR Methodology & Diagnostic Findings
- Goals & Objectives of the USAID C-LIR Diagnostic Assessment
- Workshop Design, Objectives & Ground Rules
- Overview of C-LIR Indicator Design & Development

Overview of Methodology
- Three Generations of Reform;
  1. Changing the Legal Environment
  2. Institutional Capacity Building
  3. Closing the Implementation/Enforcement Gap
- Four Dimensions of Reform
  1. Framework Laws
  2. Implementing Institutions
  3. Supporting Instititutions
  4. The Market for Reform

Presentation of C-LIR Cross-Country Findings

Breakout Session: Peer Review of Subject Matter Indicators
- Review of Bankruptcy & Collateral Indicators & Findings
- Review of Contract & Company Law Indicators & Findings
- Review of Trade & FDI Indicators & Findings
- Review of Competition Law Indicators & Findings

Panel Review of Breakout Group Findings

Tuesday, December 7, 1999

Session 1A: Presentation -- C-LIR Methodology & Diagnostic Findings
- USAID's Role in Promoting Commercial Law Development in the Region
- Goals & Objectives of the USAID C-LIR Workshop

The Challenge of Developing "Meaningful" C-LIR Indicators
Preliminary Observations -- Subject Matter, Country & Cross-Regional Comparisons

Session 2A: Presentation -- Framework Laws & the Lessons of First Generation C-LIR

Session 2B: Breakout
- Group 1: *Content & Sequencing -- Should Priority Be Given to Certain Areas of Commercial Law Reform: And If So, Which Ones and in What Order?*
- Group 2: *Special Interests vs. the Common Good -- Does "Demand" for Specific Legislative Action Translate into Effective Commercial Law Reforms?*
- Group 3: *Sources of Law -- The Scylla & Charybdis of Utilizing Exogenous Models for Reforming Framework Legislation*
- Group 4: *The Gravitational Pull -- Can Exogenous Forces Be Harnessed to Drive Commercial Law Reform?*

Session 2C: Panel Review of Breakout Session Findings

Wednesday, December 8, 1999

Session 3A: Presentation -- Second Generation C-LIR -- The Institutional Dimension
Overview: *The "Implementation/Enforcement Gap" -- The Lessons of Institutional Change Management & Their Applicability to Commercial Law Reform*

Session 3:B: Breakout -- Strategies for Closing the "Implementation/Enforcement Gap"
- Group 1: *Master-Slave Dialectic -- Popular Perceptions of the Role of the State in Commercial Life & Their Impact on the Pace & Scope of C-LIR*
- Group 2: *Technology & Change -- Leapfrogging Institutional Barriers to Implementation & Enforcement*
- Group 3: *Private Prerogative in the Public Domain -- Private Sector Involvement in Implementation & Enforcement of Commercial Laws*
- Group 4: *Drivers of Change -- Strategies for Promoting Transparency & Accountability in Enforcement of Commercial Laws*

Session 3C: Panel Review of Breakout Session Findings

Session 4A: Presentation -- A "Market" for Commercial Law Reform -- Does it Exist? Can it Work?

Session 4B: Breakout -- Can Market Forces Be Harnessed for Sustainable C-LIR Reform?
- Group 1: *Distant Neighbors -- History & Culture as Determinants of Commercial Law Reform -- The Case of Poland & Ukraine*

Group 2: *Stakeholder Analysis as a Tool for Diagnosis & Intervention in Promoting a Sustainable Market for Commercial Law Reform*
Group 3: *Top Down vs. Bottom Up, Endogenous vs. Exogenous -- Do Integrated Approaches to C-LIR Really Deliver?*
Group 4. *Toward Creating a "Virtuous Cycle" of Reform -- a Market-Based Approach to Creating a Business-Friendly Regulatory Environment*

Session 4C: Panel Review of Breakout Group Findings

Concluding Remarks

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III. Peer Review Results & Outputs

A. Methodology

The principle purpose of the Workshop was to review and validate the methodology and results used in the four C-LIR diagnostic assessments. The Peer Review sessions were used to examine the C-LIR indicators (approximately 200 questions for each of seven areas of law), and the plenary sessions on both the first and second day were used to present the overall substantive findings and get a "reality check" to determine whether the represented the conclusions and experiences of the numerous participants.

On the whole, the participants validated the basic methodology. Alexander Shapleigh and Nicholas Klissas presented the rationale for creating the new methodology to better evaluate the overall environment for reform, rather than just the specific laws being reformed. The Booz·Allen team then examined the four dimensions of law (framework law, implementing institutions, supporting institutions, and the market for legal reform); the findings in each of the seven substantive areas (bankruptcy, collateral, company, competition, contract, foreign direct investment and international trade); and two generations reform (first, passing laws, and, second, institutional capacity building).

Most participants found that the results of the four country studies reflected their own assessments of the countries in which they had experience. Several participants felt that there was some bias toward Poland and against Ukraine, but agreed with the general trends presented. Several groups said that they unanimously agreed with the results. Thus, the "reality check" proved positive -- the results obtained through use of the methodology squared with the experiences of the professional C-LIR community in the Europe and Eurasia Regions.

Just as importantly, the participants found value in the four-dimensional approach to each law as a method for defining weaknesses and opportunities in the overall legal reform environment. All participants agreed that first dimension (and first generation) work of changing laws was necessary but not at all sufficient. Most were also involved with second dimension (and second generation) institutional reform, and were very aware that the combination of law and institutional reform had not accomplished the level of impact anticipated. Discussions of supporting institutions struck a chord with most participants, many of whom felt that this area was too frequently neglected.

Of great importance in the validation of the four-dimensional approach was the fourth dimension of market for reform. This was a theme of a great number of topical breakout sessions, and the overall response indicated a desire to develop the concept more, and incorporate market concepts into the legal work.

In examining the development indicators, most participants focused on the framework law questions, in part because of their extensive professional expertise in these areas, but also because the time allotted was not sufficient for a thorough review of all sections, and framework law was the natural starting point. Various individuals had specific comments about specific indicators, but there were common themes throughout, as discussed below.

One issue aside from the content of the questions was the use of the questions. Many participants began their own assessments of the methodology by looking at the indicators apart from the narrative review. Stated otherwise, their approach was based on use of highly quantitative, scientific questionnaires for obtaining reliable statistical data. Mark Belcher explained carefully that this tool was different -- the questions were intended both to guide the interview process and capture the results of those interviews as well as the results of document surveys in a rapid assessment of general trends. Thus, the questions were not based on the more exhaustive surveys used by the World Bank, OECD or UNDP, for example, which are extremely costly.

Moreover, the purpose was to identify gaps in implementation as much as or more so than gaps in the specific laws. Hence, the four dimensional approach was designed to help "tease out" the problem areas for better understanding, and, therefore, better planning by the missions.

Mr. Belcher also explained that the questions could be compared to the dots or points in a pointillist painting. While each one had importance in itself, the greater importance was the picture created by the aggregation of these dots in a meaningful pattern. Looking at one question -- and its answer -- would no more tell the story of reform efforts than looking at a small section of blue points in a Seurat painting would enable you to see that they were part of a the clothing of a picnicker standing on a lawn. The importance of the methodology is in the aggregate combination that illustrates the trends and status in reform efforts.

From that context, it was not surprising that the greater part of the peer review discussions centered on the larger picture -- or larger sections of the picture -- than on the "dots." Certainly, there were comments on individual questions which were captured and have been addressed in the revisions included in Chapter III C of this report. The broader themes were as follows:

Weighting. There was a general consensus that equal weight for all questions, or all groups of questions, was not appropriate. Participants noted that some areas of law were clearly more important than others, and this should be reflected by the scores. As a result of this discussion, the indicators were re-weighted, both by adjusting some of the individual scores of specific questions, and by modifying the number of questions in a given area so that the aggregate weight better reflected the relative importance.

Subjectivity. Numerous participants noted that some of the questions were binary in nature (yes or no, such as "A framework law of national application is in place"), yet received a range of scores. This prompted a very useful discussion of how scoring took place, and a recognition that questions should either be phrased to suggest a range of options, or, if written in a binary manner, scored consistently. Questions have been rewritten accordingly, and notes have been made to explain the scoring more completely in the upcoming Methodology Handbook.

Redundancy and Clarity. Several participants felt strongly that a number of questions were redundant. Upon further examination, some of the questions were variations on theme, approaching the subject from several slightly different angles. The confusion regarding this, however, indicated that some editorial changes were needed to make these thematic shadings more clear, as well as to eliminate those questions that were determined to be redundant. In addressing these concerns, the questions have not only be re-written for clarity, but grouped and categorized so that they are visually and textually more coherent.

In summary, the methodology -- and the results obtained with it in Kazakhstan, Poland, Romania, and Ukraine -- passed the test of professional review by C-LIR professionals from the region. The insightful comments of numerous participants were used to refine the methodology, which were tested again Croatia, Macedonia and Albania.

USAID/EE COMMERCIAL LEGAL REFORM ASSESSMENT FOR EUROPE & EURASIA

Workshop Report

III. Peer Review Results & Outputs

B. Indicators & Results

Following are the indicators, revised in accordance with the comments and observations received at the Workshop and additional experience gained during the assessments in Croatia, Macedonia, and Albania. They are divided as follows:

Supporting Institutions
A. Bankruptcy
B. Collateral
C. Company
D. Competition
E. Contract
F. Foreign Direct Investment
G. Trade

IV. Breakout Sessions

A. Synopses of Breakout Sessions

Breakout Session 2B: Must Harmonization Flow from Globalization?

Group 2B-1. Content and Sequencing – Should Priority be Given to Certain Areas of Law Reform? If so, Which Ones and in What Order?

The background paper for this session identified the following issues for discussion:

- What is the sequencing of legal reforms? Can we start reforming all areas at once, or should some of the fundamental areas be developed first?
- How critical is the "ownership problem"? Can reforms succeed without strong local support and extensive policy formulation prior to the development of the legislation?
- The more advanced the legislation is, the more coordination is needed with the laws already in place, and in particular with the fundamental property, contract and company legislation.

The breakout group was well attended, with very animated discussion. The participants were asked to comment on their own experience in reforming economies and in particular to identify the problems in sequencing of reforms and to explain the implementation gap between countries with similar legislation but unequal implementation records.

The hypothesis that fundamental property and contract legislation should be developed first received strong support from a large number of the participants, particularly those from reforming economies. Most of them felt that inadequate policy formulation in some countries at the initial stage of reforms resulted in development of deficient fundamental legislation, which had to be corrected after several years of reform. On the other hand, some participants pointed out that the successful reforming economies, among other things, had clear reform policy formulated at a very early stage of their reform efforts. This thesis was particularly well presented by the participants from Poland.

Another participant from Ukraine pointed out that the failure to resolve some of the basic property issues in Ukraine resulted in the inability of the country to develop new contract laws and that after more than eight years of independence the country still operates without a comprehensive modern company law.

The participants from Central Asia listed among the successful legal reform projects those which were carried out pursuant to programs developed in cooperation between foreign and local

consultants, and for which the government was able to identify coordinating agencies. Some of the participants representing international institutions from developed market economies argued that the identification of local sponsors of a particular reform project is critical. Even if the project does not involve some of the fundamental laws, but rather concentrates on more complicated legislation, it can catalyze the development of other areas as well by identifying the deficiencies in those areas.

Other participants pointed out that the examples of such projects were from countries in Central Europe which had already developed contract and property laws, and in which a general consensus existed about the direction of their development.

Group 2B-2. Special Interests vs. the Common Good -- Does Demand for Specific Legislative Action Translate into Effective Commercial Law Reforms?

The topic of discussion was premised on the C-LIR hypothesis presented by Mark Belcher that the combination of competing interests together define the movement of legal reform in a society. To discuss the impact of special interests, however, it was first necessary to define the terms being used.

The group began by discussing the concept of special interests, which were defined roughly as self interest that did not take into account broader interests of society as a whole. The "common good" was also broadly defined as the good of society as a whole.

From this context, the group then examined these concepts from the standpoint of a hypothetical situation: a local factory in a small town that manufactured goods similar to goods being imported at highly competitive prices and quality. In this setting, the group quickly identified 30 or more special interests, ranging from consumers to factory employees to foreign manufacturers and their governments to local politicians. It became apparent that the many interests were intrinsically valid, but often at in direct conflict with each other. At this point, the group concluded that the "common good" was even more difficult to define than previously.

The discussion then changed from these definitional issues to an examination of the process of translating disparate interests into policy and law. Clearly, each of these groups had a demand for change, but that the demand may not be sufficient to bring about reform.

One participant noted that some groups do not really understand what they need, and thus do not know how to frame their demand into effective policy action. For example, many farmers in Albania have stated that they need new tractors, but do not understand that one of the mechanisms capable of improving their ability to buy new tractors is a good collateral law -- credit becomes available through chattel mortgages, allowing producers to purchase their

expensive equipment needs over time. Thus, the need for tractors can also be understood as demand for a better legal regime, but it is unlikely that the grass roots groups will understand this and push for the policies. The group concluded that internal demand in this situation was not enough to bring about change -- exogenous help was needed to define demand and translate it into a course of action.

It was also noted that the "common good" could not be effectively pursued by listening only to a few vocal (or quiet but wealthy) interest groups. Instead, it is best addressed when mechanisms exist to permit the voices of special interests to be heard in a transparent, open forum, and to provide a means of achieving compromise. For legal reform, it was noted that the rulemaking functions must be transparent and open in order to present subversion or corruption of the process, and in order to permit ample participation by competing interests.

These streams of discussion also led to a conclusion that the implementation/ enforcement gap is affected by how well those who are supposed to benefit from changes understand the change. That is, sometimes well defined demand leads to legal reform, which is followed by implementation because the groups demanding change are also making sure it happens. At other times, change comes without a connection to those who are intended to benefit -- for example, the farmers wanting tractors who get a collateral law. In this situation, the lack of understanding between reformers and beneficiaries acts as a barrier to implementation, because the beneficiaries do not act as watchdogs for the reform.

In conclusion, it was noted that well-defined demand is essential if reforms are to be implemented.

Group 2B- 3. Sources of Law: The Scylla & Charybdis of Utilizing Exogenous Models for Reforming Framework Legislation.

This breakout session initiated discussions around the following theme: A principal goal of Model Laws is to create, broaden or modernize framework law, actually harmonize it or set in motion a movement to harmonize it on a regional or world-wide basis. Examples of Model Laws were noted to include the following:

- Uniform Commercial Code (United States)
- Model Law on Secured Transactions of the European Bank for Reconstruction of Development (EBRD)
- UNIDROIT (The International Institute for Unification of Private Law, in Rome) Conventions on International Factoring and Leasing

To initiate discussion, two propositions were presented: first, paradigm laws such as *The Model Law on Secured Transactions (EBRD) That Relate to Credit and Security* are culture neutral because history and local tradition have no instructive role to play in designing modern financing systems. Second, model laws cannot be adopted on a wholesale basis and be effective, even with existing implementing institutions in place. Instead, they must be selectively incorporated with the foundation of existing legal structures -- based on identified rules, institutions and juridical techniques that survive from the pre-soviet era.

Comments: Source of law before the law. There is a need to balance the legal system, values, traditions and needs of the "host" country against the needs, values and legal system represented by outside interests. It was noted that there the uniqueness of each country accounts for generalizations being difficult. For example, countries such as Romania, Poland, Czech Republic have significant traditions in many commercial law areas. This is contrasted with counties such as Georgia, Kazakhstan, and Armenia where there is little of this tradition. What traditions exist in these countries is largely based on a socialist legal model. It was suggested that these countries have an advantage in terms of being able to adopt and adapt more readily the exogenous laws. In this case, the major driver for legal and regulatory reform based on the use of exogenous legislation is likely to be the trading relationships external investor relationship that exists or that the country wants to develop. Each context, then, may require a different solution. In other words, there is no unique model that is universally applicable.

There is a further issue of how to achieve balance and what to change in dealing with the use of exogenous models. A consensus seemed to develop that normative standards need to play a role but they should their use should be as guidelines and not adopted on a wholesale basis. Further, exogenous models sometimes require choices that are based on economic "realism" rather than tradition. An example of this is the decision by Romania to enact collateral legislation that is based on the Anglo-American model rather than the continental model. This occurred despite the fact that the recent social and legal history of the country favored going in another direction. The decision was ultimately driven by a belief that economic globalization and market reform is largely driven by the U.S. and Romania's economic development prospects would be enhanced by going with this system. Nevertheless, it was noted that the Romanian legislation did not represent a wholesale copying of the US model.

Group 2B-4. The Gravitational Pull– Can Exogenous Forces Be Harnessed to Drive Commercial Law Reform?

Obviously, exogenous forces *can be* harnessed to drive commercial law reform. But *will* they be? And *should* they be? And *which* exogenous forces are we talking about? To what extent transition countries *should* or *must* replicate foreign laws?

These are among the principal questions that were considered in this breakout session. The nature, role and impact of exogenous forces on commercial law reform were discussed.

The economic reforms adopted by many countries in transition desirous of joining the European Union and the WTO are the most obvious examples of exogenous forces at work. World Bank and IMF conditionality are also important examples. Likewise foreign banks and investors can be a powerful force for bankruptcy law reform, collateral law, and for new alternate dispute resolution mechanisms.

Why are potentially good reforms not equally adopted and uniformly successful? The "gravitational pull" of prospective WTO membership is not as strong in some countries as it is in others. The limited progress Ukraine has made in meeting the requirements of WTO membership illustrates this point. Poland has made full membership in the EU a central foreign policy objective whereas no such consensus exists in Ukraine. One part of the country is leaning toward Europe and the other is pulling in the opposite direction.

Among the domestic benefits to meeting WTO rules are that it helps a reform-minded transition country increase economic efficiency by reducing distortions in trade policy and by providing a regulatory framework to support growth and competitive markets.

There are many examples of countries being opposed to exogenous forces even when it is in their own best interest. If all politics are truly local, as a famous U.S. Congressman once said, exogenous forces would obviously be affected by local political forces. Reforms are often misunderstood at the local level, and the authorities may do a poor job of explaining the rationale for reforms based on donor conditionality. One participant said the law reform process in Macedonia was dominated by old line professors, and that foreign pressure was needed to get beneficial laws passed.

Opposition to reform may be deeply rooted in a country's institutions. Culture, history and geography are important determinants. Even if there is no deep-seated opposition, special interest groups may block attempts at building a consensus for reform, leading to gridlock.
In such an environment, the development of civil society can mitigate such obstacles.

It must be recognized that not all exogenous forces are beneficial for a country. A country may make a considered judgment, for example, that the price it has to pay in order to join the EU is not worth it. In some cases it may be appropriate that the efforts of exogenous forces fail.

Breakout Session 3B: Strategies for Closing the "Implementation/Enforcement" Gap

Group 3B- 1. Master-Slave Dialectic -- Popular Perceptions of the Role of the State in Commercial Life and Their Impact on the Pace and Scope of C-LIR

The background paper for this breakout session advances the following theses for discussion:

- Contract is one of the seven areas of commercial law considered in the diagnostic but can also be used in a different, more philosophical sense.
- The transition from *Status* to *Contract* is one of the great advances in man's social and intellectual history in recent centuries.
- A *Status*-ordered society was rigidly organized, with little mobility between classes and groups.
- A society governed by *Contract* is based on voluntary cooperation, with emphasis on the value of the individual. Spontaneity, diversity, variety and nonconformity are encouraged.
- In a *Status*-ordered society the lowest order is slavery.
- If a person loses his ability to labor for himself and must labor for the society, he becomes a slave to the society.
- Therefore, Communist societies are a form of slavery and represent an imperfect transition from *Status* to *Contract*.

The attendees were then asked whether this hypothesis might help explain the "Implementation/ Enforcement Gap" in commercial law. Might it have any relevance in predicting whether a particular country will be more aggressive or less aggressive in implementing commercial law reform? Can this hypothesis help explain why certain ex-communist countries have been slow to adopt free market principles while others have moved aggressively in this direction?

The Master/Slave Hypothesis received strong support from the large number of participants who attended this breakout session. Most felt that it would be a good indicator for predicting an Implementation/ Enforcement Gap. One participant argued that "the absence of freedom of contract was the absence of freedom in all spheres; the absence of freedom is slavery; so the hypothesis is relevant…." Others argued that it was important to get behind the differences in practice to find the historical, cultural or religious reasons underlying a problem.

Another participant from Central Asia listed among the obstacles to reform the "Respect for Elders" which made it difficult for anyone to challenge the views of a senior official. Although it certainly cannot be characterized as "Slavery," to take only the most prominent example, it gives the President powers far in excess of his constitutional powers. Many good new laws are not enforced or implemented because of subtle opposition by "Elders."

Although new, amended, or revived civil and commercial codes have been enacted generally based upon Western European norms, tendencies toward control and paternalism often remain.

These tendencies may arise from the desire to protect consumers or debtors who are unfamiliar with markets in situations of unequal bargaining power and inadequate judicial protections. But they can also reflect an older tradition of government officials preserving their "prerogatives" to dictate economic relations and outcomes.

Group 3B-2 Technology and Change: Leapfrogging Institutional Barriers to Implementation and Enforcement

Group 2 started from the shared recognition of the importance and potential for improving implementation through technological innovation. There was thus no question whether it could be used, but rather *how* to use technology more effectively.

Discussion started from the premise that one of the goals of the reform process is to establish a system that is fair, just and transparent to the consumers of the system. Technology can help to improve processes along these lines in a number of ways:

- It reduces opportunities for corruption by reducing the human steps and discretionary decisions that are often exploited in a corrupted system
- It improves the quality and quantity of information dissemination, so that more people are able to get information, and the information remains consistent
- It can substantially reduce transaction costs for both domestic and foreign investors and other economic actors, by improving efficiency
- It can have a multiplier effect: experience has shown that introduction of technology often results in small spin-off business, especially by young entrepreneurs, in part because it is not capital intensive and allows creative minds fill niche needs
- It can be a catalyst for re-thinking the processes in which technology is applied: for example, when courts or registries are computerized, those responsible will often reconsider the entire process to adapt it to modern trends and changes
- It can be an engine for change by creating a culture of communication that did not previously exist, instilling an ongoing demand for communication

Obstacles to change also existed. Some of these seemed universal -- computer "phobia" by established senior level employees who do not understand computers, expense of investing in the time and equipment needed to reform a process that has worked (more or less) for the decades before computers were invented. Other constraints also included government reticence in those cultures where government's traditional role has been to control all information: advances in technology have a dramatic impact on the ability of any single institution to control information and communication.

The group considered how to use technology to promote change in the commercial law area. Some of the conclusions reached included:

- It is often easiest to introduce technology when there has been no system in place at all. For example, if there has never been a registry for secured pledges, it is easy to introduce a technology based system, unlike the process of converting written company registrations to a computerizes registration, which requires redefining process and re-training personnel.
- Younger people tend to be much more receptive to both using the technology and adopting the changes.
- Technology can promote change even more effectively when it involves opportunity for private sector participation. The private sector can be an engine for change by creating technological solutions to problems.
- Technological change should be championed and "owned" by local groups or agencies, rather than imposed from outside.

Finally, the group discussed the role of the donor community, and agreed on some general principles:

- Technology should not simply be transplanted, but adapted to local needs.
- Donors should work with and through national groups who will take ownership of the technological solution and the changes. The donors should stay in the background, and national proponents should take the lead.
- Look for opportunities at any level where champions exist, and be ready to adjust programs to take advantage of such opportunities.
- Technological solutions do not need to be the most aggressive possible -- they may need to be phased in or introduced through less aggressive or complete technological solutions.
- Technology is only a tool, not a solution. Providing computers (or other technology) is only effective as a component of a process or program. As one USAID director once said: "We won't buy law books for the Bar Association. We will, however, help to establish a specialized law library, and if that requires books, we'll buy them."

Group 3B-3. Private Prerogative in the Public Domain – Private Sector Involvement in Implementation and Enforcement of Commercial Laws

The background paper for this session identified the following questions for discussion:

- What are the necessary components of an efficient enforcement system and why have the enforcement systems in Central and Eastern Europe failed in the reform period?

- Is it possible to completely replace the state enforcement mechanisms in the area of commercial law with private enforcement institutions?
- What are the benefits and the dangers from such arrangements?
- What future steps are necessary to improve the enforcement systems in reforming economies?

This session attracted participants from all groups represented at the seminar, including private practitioners, members of academia, and representatives of international economic institutions and development agencies.

The participants pointed out that complete private enforcement is not possible and probably is not desirable. Yet in many areas in which the state was considered as the only possible provider of certain services successful attempts have been made to transfer them to private parties. It was pointed out that in the transition period the demand for enforcement services in the commercial area increases proportionally to the increase of the private sector, but the state is not in position to meet this demand. The state administration acts under increased pressure to cut costs and in the same time to provide new services that did not exist before. This situation results in increased corruption and in the proliferation of informal and uncontrollable enforcement mechanisms. Arguably, a bad state administration is detrimental to reform and this situation needs to be corrected promptly.

It was observed that for private enforcement and self-help measures to operate efficiently, there must be a legal framework that clearly establishes the rights and obligations of all parties concerned. Unregulated private enforcement can result in abuse and an increase in criminal acts. Without a clear legal framework and strong institutions, it is difficult to hold those who use self-help mechanisms accountable for their actions, or to review the propriety of such actions through courts or other control entities.

The participants provided numerous examples in which state bodies were replaced by private or privatized institutions, or even by direct action of the parties concerned. Yet they indicated that in such cases prior clear rules must be in place, all private parties must be licensed to perform certain activities, and all private action should be submitted to control by the courts. In particular, the participants discussed enforcement activities carried out with the assistance of public notaries in Albania and Bulgaria, the replacement of the entire system of delivery of court documents by private providers in several countries, and the establishment of private credit registries and the related credit rating services in almost every country in the region.

The participants agreed that the ultimate solution seems to be an efficiently operating state enforcement system with wide participation of private providers of particular services. In the meantime, while the state is not in position to provide all necessary services, the best use of scarce resources seems to be in the control of licensed private providers.

Group 3B-4. Drivers of Change -- Strategies for Promoting Transparency & Accountability in Enforcement of Commercial Laws

The discussion in this breakout session was based on the following theme: Can there be successful economic development based on legal/regulatory reform without (1) transparency and (2) accountability?

The following five impacts were noted as likely if these two operating principles were compromised.

- Good government is undermined.
- Public policy is distorted.
- There is an increased risk of social resources being misallocated.
- Private sector development is hindered.
- The market economy is compromised.

How does one get to implementation of laws and some of the transparency issues associated with that? Several themes arose in the course of the discussion. First, this is a complicated and holistic process. This is not just a matter of what a government is doing because there are multiple actors and a dynamic environment.

Good legal reform requires more than just "good" law. The proper right implementing institution must be identified and set up. Further, there needs to have buy-in at the right levels of the community. Wholesale adoption of foreign laws or "expert drafts" simply does not work. Transparency and accountability in the process of reform is essential because it leads to greater understanding, dialogue, appropriate compromise, and a more reasoned legislative outcome.

Participants noted that there were problems associated with legal/regulatory reform occurring as a result of exogenous pressures, like IMF and World Bank conditionalities. Such pressures were perceived by many as a force that compromises transparency and accountability just as much as local "special interests" with power to skew an outcome. The result is not necessarily good law.

Another theme introduced was concern about continual and abrupt legal change -- e.g., frequent amendments, executive decrees, etc. Such changes make implementation and enforcement difficult. The resulting lack of transparency, although unintentional, make it difficult for even professional experts to keep up with the changes and understand the status of the laws.

Accountability issues were also discussed in the context of problems resulting from meager government budgets -- e.g., low pay contributing to corruption, resource limitations reducing essential training, etc.

Conflicts of law were also noted to be a major source of compromise to the transparency and accountability principles. Legal inconsistencies may result from discretionary actions taken by both senior government officials and the judiciary. However, these actions may be a direct result of the rapid change taking place in the governing laws as well as a lack of experience and training in the substantive areas covered by new legislation.

Transparency and accountability are also compromised when there are conflicts between state and local officials. This, it was noted, may be based on a lack of communication, uncertainty over the governing law, or merely a matter of corruption.

The opportunity to privatize certain government functions such as registries was noted as a basis for removing activities from political interests. It was noted that the opportunities associated with competitive bidding for the "out-sourced" government function provides a basis for greater openness and accountability.

Breakout Session 4B: Can Market Forces Be Harnessed for Sustainable C-LIR Reform?

Group 4B-1. Distant neighbors: History and Culture as Determinants of Commercial Law Reform --The Case of Poland and Ukraine

The background paper for the session identified the following questions for discussion:

- How can the historic links between two neighboring nations best be used to transfer the positive experience of one to the other in the period of reforms?
- How can the dramatic differences in development results in Poland and Ukraine in the last ten years be explained?
- Why clearly positive examples do not catch up – is it because of lack of understanding, the lack of resources or the lack of political will?

This session attracted participants not only from Poland and Ukraine, but also from several other countries, in which the reform is slower in comparison to their neighbors (in particular Romania, Moldova and Kazakhstan).

The hypothesis that historical development is a strong determinant in the success of legal reform received strong support from all participants. Another point of general agreement was that the domestic policy formulation and building of consensus for the direction of reform are critical factors for success. Yet there was also general agreement that the external factors can play an important role.

The participants pointed out at the beginning of reforms in Poland, there was clear social agreement about the end goal of joining the European Union and NATO. At the same time, several external factors helped the reform process gain momentum, in particular massive external support by international institutions and the Polish Diaspora.

The participants from Ukraine (including those from the USAID mission there) pointed out the existence of the following factors when Ukraine began its reforms: Ukrainian society was divided on several issues regarding future development; the goal of joining the European community was at that point only a very a distant possibility; and the period of socialist development, which was much longer in Ukraine, inflicted much greater damage on the entrepreneurial spirit of the society. Yet some of the factors that were critical for Polish success were present in Ukraine as well, but were not used in full. For example, Ukraine also benefited from the response of a large Ukrainian Diaspora, and from the willingness of the international community to provide assistance. Yet the absence of clear policy formulation in Ukraine, the lack of national consensus and the weak absorption and implementation capacity of the indigenous institutions made it impossible for the country to make the best use of the available assistance.

Group 4B-2. Stakeholder Analysis as a Tool for Diagnosis and Intervention in Promoting a Sustainable Market for Commercial Law Reform

To begin our session, we agreed to describe a stakeholder as: (1) any person, group or organization that can exert an influence on the substance, pace, or direction of commercial law reform; and (2) any person, group or organization that is affected by actions taken to change framework laws, implementing institutions and supporting institutions.

Generic themes discussed included the fact that stakeholders are needed to achieve sustainable change, and institutions must meet at least some of the key stakeholders' performance expectations or there will be no sustainability.

Much of this breakout discussion focused on professionals' first-hand observations about developments in Romania, Macedonia and Georgia.

While recognizing stakeholder power and the entities and individuals and organizations that can play a role in commercial law reform, it was noted that it is often difficult to identify the stakeholders. It is also often very difficult to energize them to play a role in the reform process. Problems of organization were noted, including an observation that problems were often caused by diffuse groups of people.

Another important theme relates to the ghosts of organizations past. This relates to hold-over organizations that had poor reputations from the Communist period, and now have lost all credibility as a stakeholder or as a potential voice or player in the law reform process. One example given was the workers' unions in Georgia, which in the past played no role as an independent voice. The result is that now workers do not view the unions as a tool or as a vehicle to get their voice heard in the law reform process.

Stakeholder leadership within organizations was also seen as a major issue. There is often a critical need to identify some pillar around which others can organize and can use as their unified voice. But, individuals with leadership qualities may not be present or the people may not be ready to "follow." In other words, there is a disconnect between the interests of leadership and those of the organization members.

It was noted that in most of the countries being discussed, the real stakeholders are the public, government officials, and the private sector. A critical issue is coordinating between the private stakeholders and the public stakeholders, figuring out a way to bring the two together as a force for reform.

Identifying stakeholders is problematic in some areas, such as competition law, because it involves very technical legal reform. The lack of "collective" voices compromises the real stakeholders in this situation -- e.g., the consumer.

A major theme was identified in this stakeholder breakout session relating to the ghost of the old political order. Under socialist regimes, government theoretically took care of everybody. Thus, there was no reason for individuals to approach the government and play a role in government work in the drafting and implementation of laws. The citizens took this broad "benefit" but paid the price of not having a say in legal/regulatory development. This attitude lingers, and even remains dominant.

Another theme discussed relates to the role played by stakeholders once they are identified and organized. There are clearly formal and informal procedures and processes that can be used by stakeholders to influence legislation -- e.g., lobbying, drafting bills, etc. One example noted was an environmental law in Georgia that provided procedures to allow for input from outside stakeholders. In most other situations, these procedures or processes do not exist. The issue then becomes -- is this an area for donors to tackle head on? Is this an area of administrative law reform that can open the door for stakeholders? It is complicated and political, so it has drawbacks.

An interesting paradigm is to engage the foreign donors to encourage the development of stakeholder initiatives in the course of many projects. For example, if there is a project involving legislative assistance or implementing assistance, the foreign donors should consider creating an open process, even where there is no formal procedure.

Group 4B-3. Top Down vs. Bottom Up, Endogenous vs. Exogenous - Do Integrated Approaches to C-LIR Really Deliver?

Group 3 started by considering the dichotomy suggested by the title of the session, with the word "versus" indicating that there had to be a choice between two approaches. It was noted that top-down reforms tend to be more efficient at some levels, with foreign experts brought in who can work quickly with local experts to draft new laws for quick adoption by the legislative body. The weakness of this is that these top-down laws are often left to languish on the books, with little real implementation. On the other hand, bottom-up or "grass roots" reforms tend to represent changes that people want implemented, but are often very expensive and time-consuming because of the lengthy stakeholder analysis required.

The group concluded that the analytical approach to these types of changes should not be an "either/or" binary decision, but should see both as complementary tools, better styled as a dynamic "yin/yang" process. Legal reform can be started from the top or the bottom, with local models or international best practices, but success will depend on bringing both ends of the spectrum into play.

Participants noted that top-down approaches are often used in their countries for two reasons. First, there is an ingrained cultural expectation that change must start at the top, and that

government should be the initiator of change. This expectation is fading, but is still present. Second, several respondents noted that grass-roots or bottom-up change usually arises through the interaction of small interest groups -- associations, trade groups, well-defined lobbies -- that do not yet exist in a critical mass in most of the transition countries.

With these observations in mind, participants noted the potential importance of donor agencies in the reform process. They can help with the organization and development of civil society by helping to strengthen and create private associations as well as create a greater climate of communication between a country's government and its citizens. In addition, it was noted that purely local legal models run a risk of isolating a country: if a nation adopts an internal solution (the "Uzbek variant"), it may be left out of the global economy, to the detriment of its citizens. Donors can help avoid this by introducing international best practices, and helping policymakers to understand the impact of isolationist decisions. On the other hand, top-down policies simply do not get implemented because the supposed beneficiaries do not understand, appreciate or desire the changes brought upon them. This too must be avoided.

In the end, it was generally agreed that much more assistance is needed in broadening local, grass roots participation in legal reform. Sometimes the reform may actually begin there, and other times it may be appropriate to start at the top by importing and adapting a foreign model. But however the reform begins, full implementation will require an ongoing balance of top-down and bottom-up assistance.

Group 4B-4. Toward Creating a "Virtuous Cycle" of Reform -- A Market-Based Approach to Creating a Business-Friendly Regulatory Environment

This session owes its origin to a statement in the World Bank's World Development Report for 1997 asserting that:

> Liberalization of the business environment can be a powerful catalyst, setting off a virtuous spiral whereby each reform makes the next one easier… The challenge is finding a way to set this virtuous spiral in motion.

The concept of catalytic reform as described in the background paper is very appealing, but the attendees were skeptical as to whether this exists in the real world. The attendees did not endorse the concept of a "Virtuous Cycle of Reform." In a particular case reform could be catalytic - but then again, maybe not. There was some discussion whether a Pendulum of Reform was the right metaphor, but then the group felt that this was not right either. Reform was really a "Stop and Go" process.

Windows of reform opportunities do open from time to time. It is hard to predict exactly when these opportunities will occur. It may be in times of war or upheaval. It could be as the result of an external threat or economic crisis. Or it may be during the "honeymoon" period of a new

administration or regime. Whatever the reason, these periods of opportunity tend to be those times when the normal rules of the game are in flux for some reason and/or incumbents with a strong vested interest in the old system have been displaced.

The lesson for donors in this is clear: donors should stay engaged so they can respond when genuine targets of opportunity come along. Reform is a long-term process, and it is a mistake for donors and reformers to think that successful reforms can be implemented in a year or two.

IV. Breakout Sessions

B. Background Papers

Workshop Session 2B: Must Harmonization Flow from Globalization?

Breakout Group 1: *Content & Sequencing -- Should Priority Be Given to Certain Areas of Law Reform? If So, Which Ones and in What Order?*

Ten years after the reforms began in the post–socialist economies, we have a situation similar to that in a crowded but strange marathon race. Some of the contestants are very close to the finish, others are still in the middle of the course, and yet another group seems to be running back to the start.

This last group is the focus of our discussion on the sequencing of legislative reforms. The question is, can we simply construct a new legislative system from top to bottom, or, is there in fact "nothing new under the sun" so that we have to work from some internal logic, common to all legal systems?

For several decades Marxism appeared to be a universal theory, able to provide answers to most questions in social and economic development. With the collapse in the 1980s of various socialist economic and political systems, however, Marxism lost its appeal and appears to have been completely forgotten.

Yet Marxist theory is still useful, at least in the field of legal development, for in order to create a cure, we need to know what caused the ailment. Now is a good time to return to Marx and look at what he wanted to destroy first, so that the reconstruction can start from there.

To Marx, the main evil of society was private property, especially when used for productive purposes (which he opted to call exploitation). The destruction of the economic base of capitalism was the first and principal task of every socialist revolution. The experience of the last ten years demonstrates, however, that no country can successfully reform its economy without first restoring this base. Likewise, no legal system can be built without having at its base clear property rights, based on the acceptance of private property as the foundation for economic development.

The pace of legal reform in the past decade (fueled by a desire to finish the process as quickly as possible) has resulted in an avalanche of different laws being proposed and adopted in very short period of time. It appears that a slower and more systematic approach would have produced

better results; for at least some of the transition economies, it is not too late to return to the basics and build the legal system on more solid ground.

Indeed, it is not possible to have a solid, predictable and stable legal system without first creating comprehensive, clear and enforceable property rights. This is not an issue for the older European countries that have such laws in place, but tends to be for the newly independent states of the former Soviet Union, where ambiguities continue to plague the property legislation.

Establishing property legislation does not require unrestricted, absolute private property rights from which there can be no exceptions. The most developed market economies impose various restrictions on private property, including substantial state ownership of some assets. Even where these restrictions are excessive, these countries have an advantage over many reforming economies: the legislation is usually clear.

Reforming economies tend to create various property categories, the most popular of which seems to be the “collective property”, and various restrictions and limitations open to a wide range of interpretations (for example, the need to use the property in a productive manner or in the interest of society). Attaching such variable political considerations to the law often provides ample opportunities for interference in the activities of economic agents and results in serious conflicts, particularly with foreign investors.

Indeed, can we have stable and comprehensive company or contract laws without clear property legislation? The answer is "certainly not." Again, the problem is not so much the *nature of the owner* (public or private, corporate or individual), but how the *property* is classified (as private, public, collective, state or something else), and who has the clear, enforceable right to alienate that property -- to sell, rent, give or otherwise define who can use it and for what purposes -- no matter what the classification.

Without resolving such issues, it is impossible to define the property rights of any economic agents and to assign value to those rights. Property legislation is thus essential for the valuation of companies, and for their long-term investments. With this in mind, there is a strong case for the eastern group of reforming economies to return to the drawing board and establish clear property laws before trying to create more stable company and contract legislation.

Once property rights have been defined adequately, the next step in creating an attractive commercial legal environment should be reformation of contract and company laws, which can be developed simultaneously. In the scramble to modernize their laws during the past decades, some countries have adopted complex commercial legislation before laying the foundation of tested, refined contract and company laws. One interesting incidence of this problem comes from Russia, where the Russian Supreme Court has refused to enforce futures contracts between financial institutions.

The problem arose after the 1998 Russian banking crisis. In several cases, financial institutions went to court over failure to honor a futures contract. The Supreme Court ruled that such contracts are a form of gambling, because the obligation of the parties cannot be specified in advance and depends on uncertain events, and consequently such contracts should not be enforced. Thus, the complex, modern banking and securities regulations permitted such contracts, but contradicted the Court's interpretation of the Civil Code, which did not, even though the agreements complied with all other relevant law.

This contradiction is not surprising. The Russian banking and securities regulations were developed independently of the Civil Code reforms. One group was responding to pressure to organize capital markets and staffed by professionals with capital markets experience. The Civil Code reformers were a different set of professionals with a very different background. This, of course, is to be expected, but problems arose from the fact that the work of the two groups was, to say the least, not sufficiently coordinated, creating serious discrepancies. In addition, the Russian legislative system -- like many others from the former Soviet Union -- has not yet fully established the classical principles of legislative ranking and priority that can produce more reasonable outcomes, especially when there are contradictions between general and special legislation.

Company laws have been the focus of many legal reform initiatives, but this work should also be coordinated with contract law reforms. The very existence of a company requires a well functioning system in which contractual obligations can be undertaken and enforced. The life of a company is found first in its many contracts, ranging from basic employment to complex mergers. In some countries, however, company laws were adopted first, and contract laws only later. As a result, there was an insufficient legal basis for many corporate activities, and courts did not know how to approach disputes.

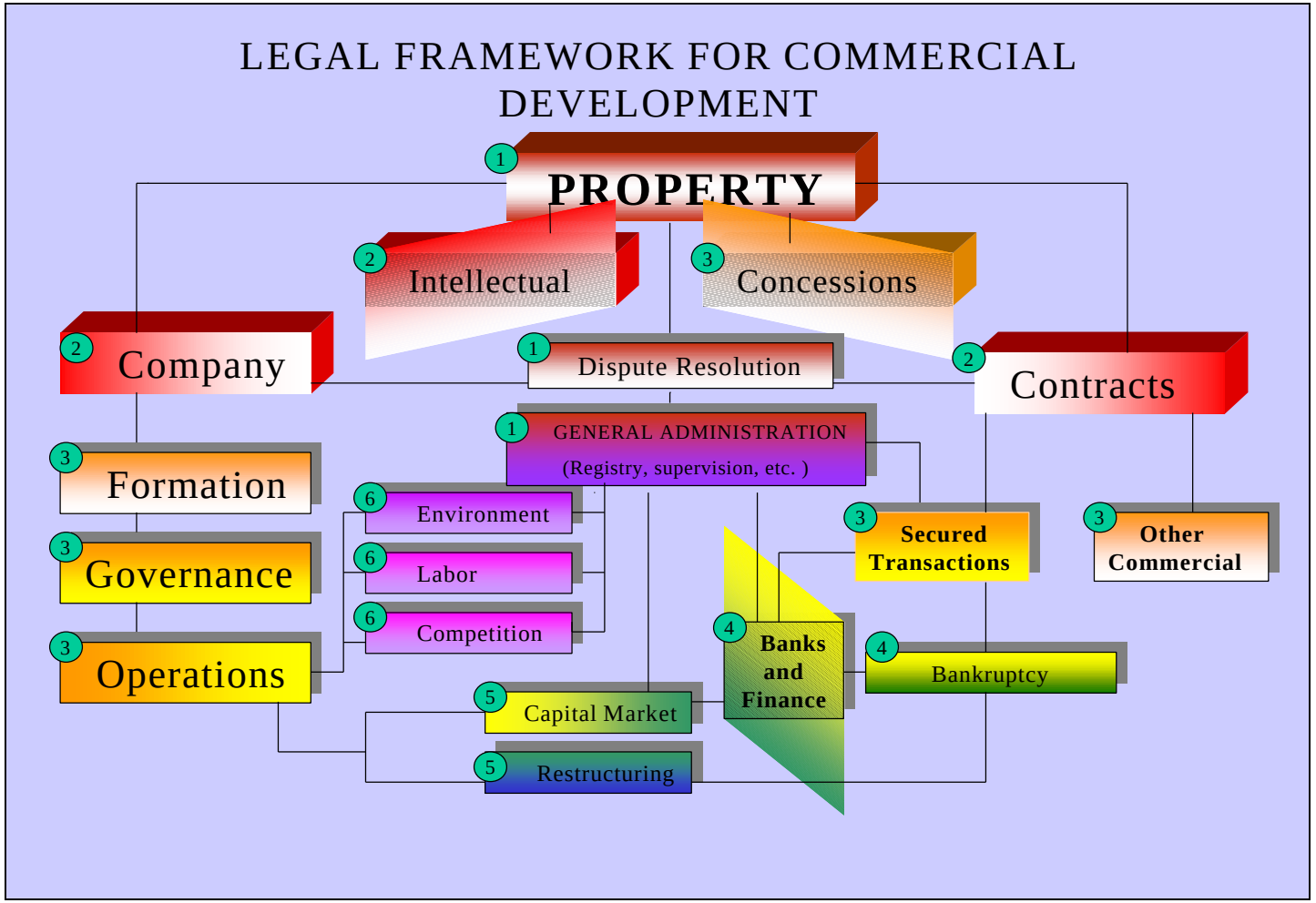
Clearly, then, coordination of company and contract law reforms with each other is important, but it is also critical that they be reformed before more complex legislation is adopted in other areas. For companies, the rules of formation and corporate governance define individual and corporate responsibilities. Without these in place, it is not possible to properly enforce compliance with other important laws, such as environmental regulations, labor practices and fair competition requirements. Such compliance does not make sense until there is a system for determining how a company will operate and which physical persons will be responsible for compliance. Despite the logic of this sequencing approach, political considerations in some countries have brought about adoption of the complex laws before the foundational ones, resulting in confusion and delayed implementation.

An example of this inefficient sequencing has been seen in several transition economies, where the development of complex laws, such as securities and capital markets legislation, did not wait for full-fledged company legislation. (This trend tends to be more pronounced in countries with a low level of established legal traditions and a high level of foreign consultants, especially

where the consulting work is focused on a limited segment of the overall reform program.) As a result, there are "modern", well-designed systems of securities legislation in countries that do not have clear company laws (such as Ukraine and Kazakhstan). In the rush to create capital markets, corporate forms have even been introduced that do not comport with well-established Continental concepts and are at variance with the company legislation itself. Of course, the existence of good corporate laws does not guarantee that securities laws will follow. Bulgaria has both, as do some other countries, but at least getting the sequence right provides a foundation for future growth.

In the same way, complex laws for commercial transactions depend on a proper base of appropriate contract law. With established rules for contract formation and enforcement, it is possible to build a system of secured transactions, and then bankruptcy. Contract and bankruptcy are the entrance and exit for commercial activity. How can a bankruptcy law be in place before there is regime for secured transactions that regulates credit relationships? Yet various pressures have led some countries to build the exit (bankruptcy) before the entrance (secured transactions) was opened. No wonder these reforms have not worked -- lending under such systems is limited, and enforcement even weaker.

Efficient and effective use of resources to develop a market-friendly legal framework requires logical sequencing. It also requires establishment of state regulators, just as good football games require of good referees. The referees should be in place as the game begins. They should also be ancillary to the game, not the focus of it, with limited but effective authority. State authorities -- courts, company registers, banking supervisors, anti-monopoly agencies -- must be developed with the laws that they will enforce and oversee. Without proper sequencing, it may be necessary at times to stop the game and start over.


LEGAL FRAMEWORK FOR COMMERCIAL DEVELOPMENT
1 PROPERTY
2 Intellectual
3 Concessions
2 Company
1 Dispute Resolution
2 Contracts
1 GENERAL ADMINISTRATION
(Registry, supervision, etc.)
3 Formation
6 Environment
3 Secured Transactions
3 Other Commercial
3 Governance
6 Labor
6 Competition
4 Banks and Finance
4 Bankruptcy
3 Operations
5 Capital Market
5 Restructuring

IV. Breakout Sessions

B. Background Papers

Workshop Session 2B: Must Harmonization Flow from Globalization?

Breakout Group 2: *Special Interests vs. the Common Good - Does "Demand" for Specific Legislative Action Translate into Effective Commercial Law Reforms?*

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."
>
> Adam Smith, *The Wealth of Nations*, vol. 1, bk. 1, ch. 10, 1776.
>
> "All animals are created equal, but some are more equal than others."
>
> George Orwell, *Animal Farm*, 1945

Definitions of the common good are not easy to come by. Jeremy Bentham spent a lifetime trying to create an economic formula for determining the greatest good for the greatest number of people. He failed. Others find themselves frustrated as it becomes clear that any common interests segment and mutate across different segments of society. Indeed, it seems that each economic actor has a special interest at variance with the interests of at least one other actor. The "common" good seems to be more a system of harmonizing conflicting desires than any single "good" that applies universally across interest groups.

Various systems have been devised to institute policies aimed at achieving common goals and meeting common needs. Some of the systems established to ensure economic equality for all have resulted more in deprivation than benefit for the majority, with a separate ruling class that turns into an economic elite. Speaking for the "people", those who seek to represent all often represent only some, and soon create their own special interest group.

Those who take Rousseau's position -- that there is a social contract between the rulers and the ruled -- tend to understand that contract as a complex negotiation between multiple interests in society. In this view, "special interests" are any interests that

represent less than all of the interests within their political division. Such differing and conflicting interests, whether between buyers and sellers, importers and local manufacturers, or polluters and environmentalists, are a natural part of society whose needs must be negotiated through a political process that all will accept.

Understanding these interest groups and how they operate can be a fundamental pre-condition for bringing about legal reform. "Back room" negotiations may produce arguably efficient special legislation, but may also result in failed implementation or even serious social backlash if those who did not participate in the decision-making process feel disenfranchised by the decision. Open consideration, on the other hand, may be a time-consuming system, but it permits negotiation between interest groups. The pejorative disdain found in some countries for "special interests" suggests dissatisfaction with the process of satisfying those interests vis-à-vis other needs, not simply the existence of different needs.

Policy and legislation reflect a balance of differing interests. Implementation requires support, which may in turn require serious compromises. An example of the numerous interests involved can be found in trade law and policy.

For discussion purposes, consider a situation in which local consumers have the choice between an imported product, or a similar product made locally. The imported product costs less and has higher quality, but the local manufacturer employs a significant percentage of the workers in the city where it is located.

1. What interest groups are affected by policies related to this trade?
    - Private Sector
        - Consumers
        - Manufacturers
        - Retailers
        - Importers
        - Suppliers
        - Labor
    - Public Sector
        - Local Government
        - National Government
            - Finance
            - International Relations
            - Elected Officials

2. What is the nature of their interests and how will they influence the decision-making process?

3. What concrete examples are available of successful and unsuccessful initiatives to reform law and policy based on competing interest groups?

***Additional Reading*:**

Sullivan, John D., *Business Associations and Democratic Reform*, Center for International Private Enterprise, http://www.cipe.org/ert/e16/reform.html.

Council for Ethics in Legislative Advocacy, *Mission Statement*, http://www.lobbyistdirectory.com/celamissn.htm.

IV. Breakout Sessions

B. Background Papers

Workshop Session 2B: Must Harmonization Flow from Globalization?

Breakout Group 3: *The Scylla & Charybdis of Utilizing Exogenous Models for Reforming Framework Legislation*

Concept of Model Laws

- Goal: to broaden and modernize specific law, actually harmonize it or set in motion a movement to harmonize a particular law on a regional or world-wide basis
- Examples of Model Laws
  - Uniform Commerical Code (United States)
  - Model Law on Secured Transactions of the European Bank for Reconstruction of Development (EBRD)
  - UNIDROIT (The International Institute for Unification of Private Law, in Rome) Conventions on International Factoring and Leasing

Model Law Drivers

- International Business Community (e.g., Financial Services) Seeking Cross Border Transaction Certainty
- Proponents of Market-Oriented Economic Growth
  - Bilateral Assistance Organizations (USAID, EU TACIS, etc.)
  - IFIs (EBRD, IBRD, ADB, IMF)
  - UN
- Private Sector

Principal Objectives of EBRD's Model Law on Secured Transactions

- Stimulate Economic Growth
- Enhance Access to Credit via Reduction of Risk
- Lay Foundation for Reliable & Active Legal System for Secured Transactons

Core Principles of EBRD's Model Law on Secured Transactions - I

1) Reducing credit Risk
2) Creating Non-Possessory Secured Interests that are Easy and Inexpensive to Create
3) Satisfying Claims in Default
4) Establishing Effecting Methods of Enforcement
5) Assuring that Effective Interest Survives Bankruptcy
6) Ensuring Low Cost Registration and Enforcement
7) Covering for All Types of Assets

Core Principles of EBRD's Model Law on Secured Transactions - II

8) Establishing Clear Priorities
9) Assuring Commercial Flexibility
10) Establishing Uniform Rules (Harmonization)
11) Inclusion of Security Devices (e.g., Factoring, Leases. Etc.)
12) Making this Part of a Comprehensive Code that is Readily Available

Model Laws and NIS/CEE Legal Heritage

- Complex Heritage
  - Socialist Law
  - Civil Law
  - Common Law
  - Informal Institutions
- Cultural Issues

Model Law Drivers

- International Business Community (e.g., Financial Services) Seeking Cross Border Transaction Certainty
- Proponents of Market-Oriented Economic Growth
  - Bilateral Assistance Organizations (USAID, EU TACIS, etc.)
  - IFIs (EBRD, IBRD, ADB, IMF)
  - UN
- Private Sector

Select Observations

- Adopted Laws May Resemble The Tradition From Which It Was Imported But It Will Usually Take on a Different Form in Operation Because of the Importance of Local Context and Culture
- The Informal Sector May Displace the Formal Substantive Sector Even if There is Complementarity Because of a Lack of Accessibility to Rules and Regulations that Are Equitable, Consistent and Enforceable.

IV. Breakout Sessions

B. Background Papers

Workshop Session 2B: Must Harmonization Flow from Globalization?

Breakout Group 4: *The Gravitational Pull -- Can Exogenous Forces Be Harnessed to Drive Commercial Law Reform*

Overview:

Obviously, exogenous forces *can be* harnessed to drive commercial law reform. But *will* they be? And *should* they be? And *which* exogenous forces are we talking about? To what extent transition countries *should* or *must* replicate foreign laws is the overarching question considered in this session.

The benefits of EU accession are clear: political stability, free trade and capital flows, access to common funds, and locking into reasonably market-friendly policies. The desire of many European transition economies to join the European Union has motivated many of them to adopt economic laws that meet EU requirements in such areas as taxation, trade and competition policy. Yet the pace of reform varies greatly. Poland has made full membership in the EU a central foreign policy objective, but no such consensus exists in Ukraine, where part of the country is leaning toward Europe and the other is pulling in the opposite direction. Romania is undertaking legislative regulatory reform to meet EU accession standards, but has a long way to go in the areas of internal market (particularly public procurement, intellectual property, and data protection) and customs.

WTO membership is an important step for transition economies, and virtually all have applied to join. The WTO provides a firm institutional base for the application and enforcement of multilaterally agreed trade rules on goods and services and on the protection of intellectual property rights. Each WTO member undertakes commitments to cap (bind) tariffs on imports and enjoys corresponding rights for its exports to member countries. To get into the WTO, a country must address a plethora of issues such as market access, subsidies, health standards, trade in services, intellectual property, and government procurement.

The "gravitational pull" of prospective WTO membership is not as strong in some countries as it is in others. The limited progress Ukraine has made in meeting the requirements of WTO membership illustrates this point. In Ukraine, areas of concern

include agriculture, the customs system, excise and value added taxes, import licensing and other non-tariff barriers, industrial subsidies, national treatment, services, state trading, transparency and legal reform, and trade related intellectual property issues. Kazakhstan is ahead of Ukraine on WTO accession but still has problems of its own. Kazakhstan's persistent trade barriers include issues of contract sanctity, burdensome customs requirements, aggressive tax inspections, vague commercial law structures, inefficient registry administration, and intellectual property rights (IPR) failings.

In terms of WTO membership, the fact that so many Eastern European countries – e.g. Poland, Romania, Czech Republic, and Hungary – were "grandfathered" into WTO by reason of prior membership in GATT clouds the analysis. Essentially, it means that these countries did not have to go through the rigorous WTO accession process. They were not required, as a condition of membership, to make their laws responsive to the demands of international free trade to the same extent as would new applicants.

For reform-minded transition countries, there is a major domestic benefit to meeting WTO rules. It helps such a country increase economic efficiency by reducing distortions in trade policy and by providing a regulatory framework to support growth and competitive markets. WTO could help a country achieve and maintain liberal trade regimes at home, despite strong local vested interests. State enterprises, often buttressed by monopoly privileges, dominate economic terrain that could more fruitfully be given over to competitive markets. WTO is one arrow in a country's quiver to avoid the capture of trade policy by vested interests.

Exogenous forces are much broader than WTO and EU accession. For example, foreign banks can be a powerful force for bankruptcy law reform, collateral law, and for new alternate dispute resolution mechanisms. While US-style lobbying may be frowned upon in certain societies, foreign investors have achieved success as advocates for reform in company and contract law, anti-monopoly law, FDI and trade law. In Kazakhstan, for example, the Foreign Investment Council brings foreign investors together with government representatives, creating an institutionalized channel for investors to voice their needs for law better attuned to the realities of market economics. Although similar councils exist in other countries, the Kazakhstan council is a model for cooperation between the public and private sectors. It meets with the President of Kazakhstan at least twice a year. At those meetings the Council presents a proposal for the work in the next six months and reports on the status of previously approved tasks. The Council is not a damage-control institution, as is common in some countries, but rather a forward-looking body of experts who prepare proposals for the improvement of the investment climate in the country.

Exogenous forces might help to make institutions less susceptible to capture by special interests and gridlock, and, perhaps most important, in consensus-building for reform.

This may be so even though opposition to reform may be deeply rooted in a country's institutions. When the normal rules of the game are in flux for some reason, such as an economic crisis or during the "honeymoon" period of a new administration or regime, it may be possible to displace the old vested interests and create meaningful reform.

Topics for Discussion

1. Can you suggest examples from your own country where exogenous forces were harnessed to drive commercial law reform? Who did the harnessing and what were the results?

2. Can you suggest some cases where the influence of the exogenous forces was beneficial for commercial law reform and some cases where it was not?

3. In the case of an inward-looking, xenophobic society, are there any "lessons learned" on how the country can be made more amenable to accept best practices from the outside world?

4. Are there any forms of harmonization of law that are inappropriate and should be avoided?

5. How do local vested interests interact with exogenous forces? Are they necessarily antagonistic?

Key Readings

World Bank. "Legal Institutions and the Rule of Law." Chapter 5 in *World Development Report 1996: From Plan to Market.* New York: Oxford University Press.

IV. Breakout Sessions

B. Background Papers

Workshop Session 3B: Strategies for Closing the "Implementation/Enforcement Gap"

Breakout Group 1: ***Master-Slave Dialectic -- Popular Perceptions of the Role of the Sate in Commercial Life & Their Impact on the Pace & Scope of C-LIR***

"What is essential to the idea of a slave? That which fundamentally distinguishes the slave is that he labors under coercion to satisfy another's desires. What… leads us to qualify …the slavery as more or less severe? [T]he extent to which effort is compulsorily expended for the benefit of another instead of for self-benefit. If all the slave's labor is for his owner the slavery is heavy, and if but little it is light.

"The degree of his slavery varies according to the ratio between that which he is forced to yield up and that which he is allowed to retain; and it matters not whether his master is a single person or a society. If, without option, he has to labor for the society, and receives from the general stock such portion as the society awards him, he becomes a slave to the society. Socialistic arrangements necessitate an enslavement of this kind…." Herbert Spencer, "The Coming Slavery" in *The Man Versus the State* (1884).

Overview:

The notion of "freedom of contract" is one of the great virtues of market-oriented legal systems. Parties are free to negotiate performance requirements and prices, to allocate risk of loss if conditions change, and to specify how disputes will be handled. Also during the course of the contract, if the bargain ceases to make economic sense to one of the parties, contract law will generally allow the party to withdraw from the arrangement and pay monetary compensation rather than to continue to perform under the contract.

In centrally planned systems, by contrast, concepts of property were not based on individual rights or on the nature of the property, but on the identity of the owner. Parties had no freedom either to enter into or to exit from commercial contracts. Commercial contracts were mere instruments of the plan, and full performance was generally required. The collapse of central planning put an end to these notions of contract, and they were replaced by new, amended, or revived civil and commercial codes. While these codes

generally follow Western European norms, tendencies toward control and paternalism sometime remain. These tendencies may arise from the desire to protect consumers or debtors who are unfamiliar with markets in situations of unequal bargaining power and inadequate judicial protections. But they can also reflect an older tradition of trying to dictate economic relations and outcomes.

In communist countries the system inculcated in the people a belief that the state had a central role to play in running the economy and guarding against the evils of markets and private entrepreneurs. Even after the fall of communist rule, public servants may believe that the state (and they personally) should determine who benefits economically, not the operation of impersonal markets. The idea that private entrepreneurs should be able to enrich themselves without the approval of the state has yet to acquire legitimacy in the eyes of many government officials, and the most minute details of their operations are considered the legitimate business of multiple public officials.

There is a second, more philosophical meaning of the phrase “freedom of contract.” This refers to the transition from *Status* to *Contract* - one of the great advances in man’s social and intellectual history in recent centuries. *Status* was the characteristic principle for the organization of society five hundred years ago. There was little mobility between classes and groups. Society was rigidly organized, with every individual occupying the place assigned to him by the exigencies of authoritarian government. The individual was no more than a means to the end set up by the state. The way of life in a society governed by *Contract* is based on voluntary cooperation, and the tendency is toward the gradual elimination of coercion in all its forms. Spontaneity, diversity, variety and nonconformity characterize a contract-based society with the emphasis on the value of the individual as the supreme end of government.

Topics for Discussion

6. Is Spencer right in suggesting that in socialist societies a man becomes “a slave to the society?” Is the lack of “freedom of contract” in socialistic societies a form of slavery? To what extent can this concept be useful in explaining the "Implementation/ Enforcement Gap” in commercial law?

7. Do socialist societies reflect an imperfect transition from Status to Contract? Does this concept have any relevance in predicting whether a particular country will be more aggressive or less aggressive in implementing commercial law reform? Can this concepts help explain why certain ex-communist countries have been slow to adopt free market principles while others have moved aggressively in this direction?

8. In many ex-communist countries there is a nostalgia for the “good old days” of central planning and state control. Would the extent of this feeling among the

intelligentsia or the electorate be a good indicator of whether an "Implementation/ Enforcement Gap" is likely to exist in a particular country?

9. As an alternative to developing and applying detailed C-LIR indicators, is it possible to predict implementation/enforcement success in a particular country through general principles such as real "freedom of contract" (not the theoretical kind)? Is this a good indicator of whether a country will mount an aggressive legal reform program or not?

10. Experience in many countries has shown that even though the formal rules governing commercial relationships may change, the pre-existing informal norms and enforcement characteristics change only gradually, if at all. How can this mindset be changed? Is there any way to assure that enacted reforms are not shortchanged or undercut in this way?

Key Readings

Rubin, Paul H. "Growing a Legal System in Post-Communist Economies," *Cornell International Law Journal*, 27 (1): 1-47.

World Bank. 1996. "Legal Institutions and the Rule of Law." Chapter 5 in *World Development Report 1996: From Plan to Market.* New York: Oxford University Press.

IV. Breakout Sessions

B. Background Papers

Workshop Session 3B: Strategies for Closing the "Implementation/Enforcement Gap"

Breakout Group 2: *Technology and Change -- Leapfrogging Institutional Barriers to Implementation & Enforcement*

Constraints analyses in different transition economies frequently coincide in identifying bottlenecks common to most. These include lack of accessible information, bureaucratic delays, rent-seeking authorities who control key points in mandatory processes, and excessive centralization. These can occur at a remote customs post, where intransigent officials may perform punctilious scrutiny of paperwork in hopes of extracting a "grease" payment, or in the center of government, where a high ranking official may cite regulations that no one else has ever seen. At every level, these behaviors and institutional inefficiencies create unnecessary barriers to the implementation and enforcement of market-oriented legislation, and thereby impede economic growth.

Projects to remove such barriers often focus on improving performance of the individuals involved in providing (or withholding) services. Technology is used to enhance performance -- case tracking software, for example, enables courts to manage their caseloads better. With ongoing advances in technology, however, the question arises: can technology be used to *by-pass* human and procedural bottlenecks, instead of simply making them more efficient?

Principal institutions and organizations involved in commercial law reform include the legislature, office of the president, ministries, courts, registries, notaries, customs, anti-monopoly agencies, investment promotion agencies, chambers of commerce, bar associations, professional associations, universities, banks and banking associations and other public and private sector groups. Technology can increase the internal efficiency of each of these entities, but it can also improve services to end users through expanded access and interaction. In some cases, it can improve implementation by by-passing intransigent or inefficient individuals who currently act as barriers.

Of course, technology alone is not sufficient -- it must be designed to meet the needs of both the institution adopting technical solutions as well as the end users. Intransigent individuals can still impede adoption of technological solutions in some cases. Once in

place, however, computerized systems reduce reliance on rent-seekers and inefficient employees.

Technology should be viewed as a tool in the process of change. On occasion, those providing technological solutions allow the technology itself to drive the process, or fail to link the solution with the need. The capacity to gather data through computerized registrations, for examples, occasionally leads programmers to require much more data than is necessary for the registration itself. Overly burdensome or complex systems can be worse than the problems they were employed to solve by eliminating the rent-seekers who could at least make the old system work, albeit for a higher transaction cost, and creating computerized problems without a human interface.

The following table presents a small sample of potential technological solutions to implementation and enforcement problems:

Bankruptcy	Networked information on bankruptcy filings, searchable by creditors or potential creditors, that provide information on the status of cases
Collateral	De-centralized electronic filing of chattel mortgages at numerous regional and sub-regional offices, with information centralized through a computer network
Company	On-line registration, combined with filing of original documents, to speed up and reduce the cost of registration (In Delaware, this system permits registration within a few hours.)
Competition	Interactive internet sites for reporting violations or perceived violations of anti-monopoly laws by the public
Contract	More efficient, lower cost litigation through software-based case management and tracking systems
FDI	Transparent, rapid dissemination of all laws affecting investment through a web-site, especially if no law becomes effective until published through the site
Trade	Reduced import/export transaction times and costs through electronic document clearance procedures combined with rational spot inspections

Questions for Discussion:

- What technological innovations have already been adopted by implementing and supporting institutions? Have they produced the intended results?
- What obstacles -- whether political, financial, human resource or others -- stand in the way of increasing transparency of laws and implementation through electronic dissemination of laws, procedures, decisions and other state actions affecting the commercial arena?
- What role can the private sector play in bringing technological solutions to implementation and enforcement efforts?

IV. Breakout Sessions

B. Background Papers

Workshop Session 3B: Strategies for Closing the "Implementation/Enforcement Gap"

Breakout Group: *Private Prerogative in the Public Domain -- Private Sector Involvement in Implementation and Enforcement of Commercial Law*

> "In our own lives, let each of us ask -- not just what will government do for me, but what can I do for myself?"
>
> Richard M. Nixon, *Second Inaugural Address*, January 20, 1973

Following the economic liberalization in the early 90s, all post-socialist economies experienced to some degree a decrease in the capacity of implementing institutions to perform their functions efficiently, or to enforce laws effectively in the commercial realm. The dramatic increase in private sector activity increased demand for their services at the same time that budget cuts were reducing the capacity of these institutions to provide those services, much less adjust to the new conditions during the turbulent times of transition.

Arguably, the poor quality of public institutions is a constraint to economic growth and development. In order to improve their services, public institutions need to concentrate on what they do best and cease performing services that the private sector can perform better. Complete reliance on the private sector for implementation and enforcement of commercial laws is not realistic or even possible, and in some cases can even be counterproductive.[1]

Effective private involvement in implementation and enforcement of the laws requires clear definitions and regulations setting forth the rights and obligations of the potential private operators and proper protections for end-users of the services. More importantly, such involvement requires identification of those operations that can be effectively taken over by the private sector, and a consensus to transfer them out of the public sector.

[1] For an extensive discussion on this issue, see Hay and Shleifer, "Private Enforcement of Public Laws: A Theory of Legal Reform."

The United States provides numerous examples of active private sector involvement in the administration of law, ranging from court procedures to the use of force in certain commercial situations. At a procedural level, for example, most court documents are delivered and even filed by private services. Compliance is ensured because the service providers are legally liable for damages if they fail to perform the services satisfactorily, and liability is often based on failure to comply with rules of evidence or procedure. Thus the litigation process itself is the guarantor of the service delivery.

What parameters should be placed around private enforcement of rights? Certainly, the obligations to be enforced must be legally valid. U.S. laws permit creditors to hire private parties to attach secured property when a debtor defaults. In effect, the famous "repo man" is a private version of the sheriff, but more efficient in that the repossession is based on prior agreement under certain circumstances, thus eliminating the cost and expense of reducing the claim for repossession to judgement through the courts then enforcing the judgement through the sheriff. Although risk of abuse of this private police power would seem high, the laws of contract and tort (obligations) protect debtors who are abused -- keeping the private sector service providers cautious in execution of their tasks.

Over the past ten years, some state-provided services have begun to migrate to the private sector in some central and eastern European countries and the CIS. In Europe, for instance, all notarial services have been privatized, or, to be more specific, the position of the notaries transformed, so that they now are similar to other practicing lawyers rather than state functionaries. In addition, a number of countries now license private companies to conduct evaluations of company property for tax and transactional purposes.

As suggested in the example of United States practices above, delivery of all court documents (including subpoenas and court orders) can be taken care of by private companies, provided that proper rules and procedures are established first. Private parties can successfully perform bailiff's functions, again, if the laws clearly spell out the sanctions for abuse as well as the rights of the debtors.

Private operators are heavily involved in customs processing and other related services in many countries, including goods inspection and certification (such as SGS). These situations do run the risk of abusive practices evolving from private sector monopolies, but is this any worse than the risk of abusive state-run monopolies? At least with private parties it is generally easier in most countries to sue and enforce judgements against private sector service providers.

In some cases, the development of private services actually keeps commercial actors from needing to rely on the court system or otherwise burden the state. Banks, retailers, credit card companies and others in some countries can rely on credit rating services to

avoid lending to bad debtors who have proven unreliable in the past. By avoiding high risk or unreliable loans, these institutions lower the cost of credit by lowering the losses, at least at some levels (such as consumer transactions -- large scale corruption still effectively defeats credit ratings and other protective mechanisms in some places). Moreover, such rating services assist individuals in establishing their own creditworthiness, and thus their ability to access increasing amounts of credit.

Frustration with the slow pace of judicial procedures, not to mention distrust of the specialized technical capacity of some judges, has been an important factor in creating private court systems in the form of arbitration. By following transparent, professional procedures, independent arbitration services have gained the right to have their decisions enforced by the state courts. Many international contracts require binding arbitration by a recognized arbitration group, and do not permit submitting disputes to the local courts. In addition to providing investors with security about the fairness of decisions, this practice reduces the burden on the often-overburdened state courts.

Some of the most important groups of private implementers of law in developed market economies are self-regulated professional organizations. These are particularly important because their professional members depend on public confidence in order to provide their services. Ranging from stock exchanges to the medical profession, more and more activities are supervised and regulated by professional organizations. While the central and eastern European countries had some tradition in that area from the pre-war period, in the CIS such traditions never existed or completely disappeared.

If states are to move toward private sector execution of traditionally or historically public functions, a well defined implementation policy and procedure will be needed. This can include legislating the transfer (including privatization), but can also be accomplished simply by ceasing operations. For example, ministries involved in agriculture sometimes inhibit development of market-oriented services (such as seed production) by providing subsidized products or services. These services may not be ideal, but unsubsidized market operators cannot compete against them. If demand truly exists, the market will develop once the government gets out of the particular business in question.

IV. Breakout Sessions

B. Background Papers

Workshop Session 3B: Strategies for Closing the "Implementation/Enforcement Gap"

Breakout Group 4: Drivers of Change -- *Strategies for Promoting Transparency & Accountability in Enforcement of Commercial Laws*

Overview Of Transparency And Accountability Issues

Transparency and Accountability Are Essential, Foundation Principles for the Operation of Efficient Market Economies. Corruption is a likely outcome in a society operating without transparency and accountability.

The negative Impacts include the following:

- Good government is undermined
- Public policy is distorted
- There is an increased risk of social resources being misallocated
- Private sector development is hindered
- The market economy is compromised

Stakeholder cooperation is essential to assuring the integrity of the state, civil society and the private sector.

Check List of Strategies for Promoting Transparency and Accountability

1) **Supporting accountability and transparency through the democratic process -- e.g., free parliamentary elections**
2) **Establishing a creative partnership between government, NGOs, and the private sector**
3) **Promoting administrative reform and enforcing conflict of interest rules in the public service (e.g., Foreign Corrupt Practices Act (USA))**
4) **Enacting administrative laws to require the accountability of decision-makers**
5) **Developing mechanisms that provide public officials with channels to report acts of alleged corruption and protect the "whistle blower" and that assure independent investigation and monitoring will take place according to established policies and procedures:**
   - **Ombudsmen**
   - **Office of Independent Counsel**
   - **Inspector General**
6) **Creating and maintaining an independent judiciary and ensuring that legal procedures and remedies provide an effective deterrence to corruption**
7) **Developing a transparent, competitive public procurement system**
8) **Promoting the development of self-regulatory organizations (SROs) in the private sector that have established rules and regulations covering member operations along with sanctions (e.g., security exchanges in the US such as the New York Stock Exchange, NASDAQ, etc.)**
9) **Ensuring the existence of a "free" press with investigative watchdog capabilities**
10) **Maintaining domestic, independent anti-corruption agencies with adequate financial, administrative and legal resources that are associated with foreign and/or international anti-corruption regimes.**

IV. Breakout Sessions

B. Background Papers

Workshop Session 4B: Can Market Forces be Harnessed for Sustainable C-LIR Reform?

Breakout Group 1: ***Distant Neighbors -- History and Culture as Determinants of Commercial Law Reform -- The Case of Poland and Ukraine***

"There is no free Poland without independent Ukraine"

Josef Pilsudski

Poland and Ukraine are neighbors with much common history, which, while not free of problems, has created a strong link between the two nations and the capacity for mutual understanding. Yet it is difficult to identify two other countries in Europe that have grown so far apart in the last decade of profound political and economic changes.

Today the eastern border of Poland is the most pronounced economic divide in Europe. While a large part of the Ukrainian population looks at Poland as a prosperous neighbor that which can serve as a model for development, Ukraine appears to have used nothing from the Polish prescription for success. In our study, Poland and Ukraine are at the opposite ends of the evaluation.

Why is it that Poland managed to complete the restructuring of its legal system in ten years and Ukraine does not even have a clear idea what kind of legal system it wants to develop? To what extent have external factors contributed to Polish success and how can they be made work in Ukraine? Is the absorption capacity in Ukraine so low as to make any further assistance impossible at this time? Can the Ukrainian problems be resolved by applying the Polish model?

The principal difference between the two countries seems to be choice of development models. For decades prior to the disintegration of the communist system, forces of change existed in Poland that shared a general consensus on what kind of country Poland should become after the collapse of communism.

In Ukraine such forces were practically non-existent. Soviet society was generally much less tolerant, and Ukrainians had no example of independent development in the past to look to. Yet after declaring independence, Ukraine became an open society in which free

exchange of ideas has become the rule, and all options remain available. The Ukrainian population is educated and certainly well informed about what is going on in neighboring countries. Ukraine has plenty of natural resources, fertile land, a diversified industrial base and no external problems or violent internal conflicts, which can badly hinder development. What prevents it from being the success story of the former Soviet Union?

Perhaps, instead of looking only at the failures in Ukraine, we can identify some of the elements that contributed to Polish success, and try to discern which of these are absent in Ukraine.

Polish legal reform was based on two foundations – pre-socialist legal tradition and recognition of private property as the base of economic activity. Ukraine has neither. A market-based legal system never existed in Ukraine, and the attitude towards private property has not yet developed along Polish -- and market -- lines. The Constitution of Ukraine accepts the concept in theory, but practice is somewhat different.

Poland has received substantial assistance from the West. In terms of per capita assistance, Poland ranks considerably higher than Ukraine, despite the fact that Ukraine obviously needs more assistance than Poland. Yet is it possible to help someone who does not want to be helped? How much did the ability of the Polish society and institutions to absorb assistance contribute to its success? How much can the organizational experience of Poland be transferred to Ukraine?

Poland was an independent country, which, while in the Soviet orbit, had all institutions of a sovereign state in place. In contrast, Ukraine was historically subordinated to a much stronger centralized authority (indeed, the rise of Kiev in 900 A.D. is studied as part of Russian history). As a result, some of Ukraine's institutions have been historically national in name only, being used almost exclusively for execution of orders. The development of such institutions after the independence has taken time and absorbed much of the limited resources of the country. It is only now, after several years of independence, that a large enough pool of well trained young people is available to staff the public institutions. Yet even the best training is not enough to substitute for the necessary professional experience.

Poland is in position to join the European Union shortly. As part of its preparation for full membership, Poland must harmonize its domestic legislation with that of the EU, which is also a foreseeable accomplishment. For Ukraine, joining the rest of Europe is a stated goal but a distant prospect.

Yet, if there is a political will, how many of those factors cannot be replicated or at least used in Ukraine?

First, is there a viable model, other than the Polish, at this time? None of Ukraine's neighbors has been more successful than Poland in any aspect of reform Only Belarus is behind Ukraine. No matter what hardships the Poles had to endure during the so-called "shock therapy," they are but a minor fraction of the problems of Belarus without reform. It seems that building a consensus in the Ukrainian society is going to take some time.

Second, the Polish legal tradition was useful as an example, yet fairly obsolete in practice. In terms of commercial legislation, all development ceased after the communist takeover. While the tradition was preserved, experience in the application of the laws was not. Besides, Polish laws were in force in at least part of Ukraine before World War II. If Ukraine wants to be part of Europe, the Polish model may not be sufficient in light of historical and cultural differences.

Third, donors have not imposed limits on assistance to Ukraine – on the contrary, there is a strong commitment to provide more help, but Ukrainian institutions must be better organized and able to use the available resources. If assistance is desired, it will be available. As with Poland, Ukraine has a large Diaspora, which can provide a pool of experts familiar with the country, and even more important – a pool of potential investors and technical managers.

Further, Ukraine has had sufficient time to establish most of the basic institutions necessary for the functioning of an independent country. It has been through several elections, including the last presidential election in mid-November 1999. The country is stable and has functioning democratic institutions, admittedly not without their problems, but very different from those in Soviet times.

Finally, the entering European Union is a stated long-term goal for Ukraine. This does not contradict the strong inclinations, at least in part of the population, for the country to maintain close relations with Russia and Belarus. Most of the legislative measures required to harmonize domestic legislation with that of the EU have been adopted by Russia as well, and those measures are not political, but rather technical in character.

However, in order to progress, Ukraine needs to make important decisions. Most crucial is the selection of the economic model that it wants to follow. The last elections demonstrated that no matter how slow the reforms are, the majority of the Ukrainians prefers them to a return to communism.

What Ukraine can learn from Poland in the area of legal reform can be summarized as follows:

First, Ukraine must develop a well-conceived plan for legislative work, including a comprehensive review of the existing legislation and the identification of all conflicting

legal norms, proper sequencing of the legislative priorities and better quality of the drafting work. Ukraine needs to establish clear property rights, with unambiguous division between public and private property, without intermediate and unclear categories such as collective ownership and mixed enterprises.

Second, foreign assistance can be better used, coordinated by a strong local institution in charge of focusing efforts of different programs of technical assistance. Poland also went through a period of uncoordinated assistance provided through many local institutions and has excellent experience in assistance coordination.

Third, implementing institutions must be established prior to or simultaneously with adoption of new legislation. While not without problems, the Polish example in this area is one of the best among the reforming economies in Europe. The Competition Agency, the Foreign Investment Agency and the Collateral Register are but several of the many institutions which benefited from direct foreign assistance and have become a viable and effective part of the government/business infrastructure of the country.

Fourth, Ukraine must identify and adopt legislative solutions and institutional arrangements that have proved effective elsewhere in attracting foreign investors, supporting small and medium businesses, providing avenues for alternative dispute resolution and securing better consumer protection.

Ukraine also needs to develop a transparent, efficient and quick privatization model to attract private investment and support private sector growth. The Polish model is certainly worth serious consideration. Thereafter, development of capital markets is a logical step. The size and diversity of the Ukrainian economy should support a viable stock exchange, channeling domestic and foreign capital to the enterprise sector.

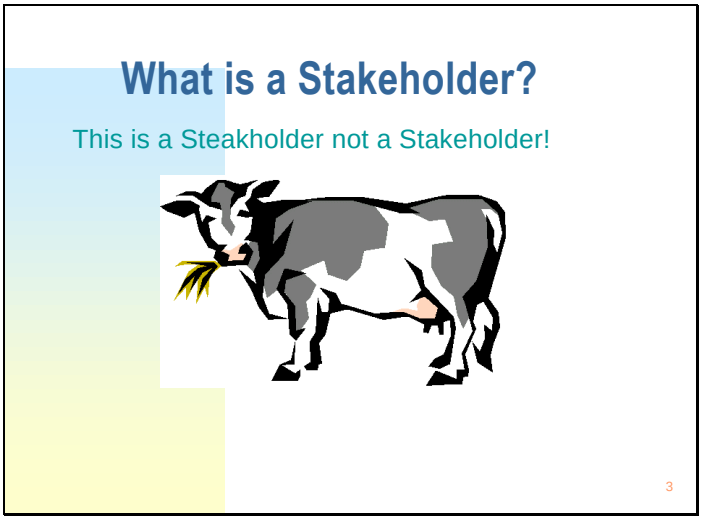
Ukraine has a long way to go, but there is no reason its Western border cannot once again serve to connect two states rather than separate two vastly different regions of socio-economic development.

IV. Breakout Sessions

B. Background Papers

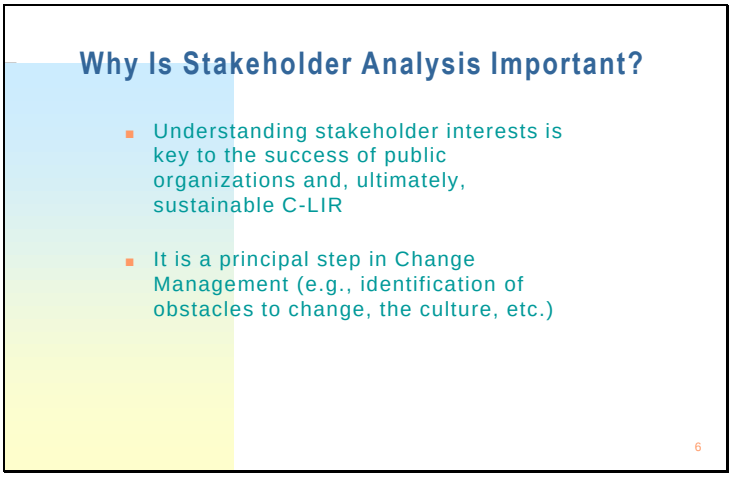
Workshop Session 4B: Can Market Forces be Harnessed for Sustainable C-LIR Reform?

Breakout Group 2: ***Stakeholder Analysis as a Tool for Diagnosing & Intervention in Promoting a Sustainable Market for Commercial Law Reform***

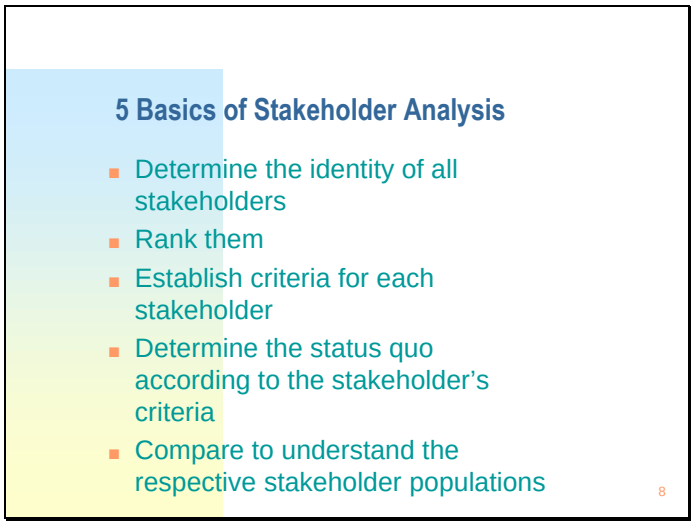


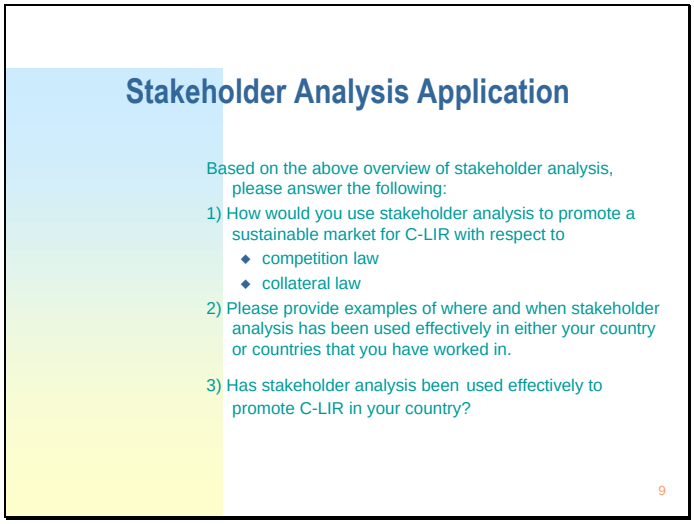

What is a Stakeholder?
Any person, group or organization that can exert an influence on the substance, pace, or direction of commercial law reform.
Any person, group or organization that is affected by actions taken to change framework laws, implementing institutions and supporting institutions
4


Why Focus on Stakeholders?
A key to achieving sustainable change is fulfilling key stakeholders expectations
Institutions must meet at least some of the key stakeholders' performance expectations or there will be no sustainability.
5


Why Is Stakeholder Analysis Important?
Understanding stakeholder interests is key to the success of public organizations and, ultimately, sustainable C-LIR
It is a principal step in Change Management (e.g., identification of obstacles to change, the culture, etc.)
6


Stakeholders May Include
Private Sector
Businesses
Consumers
Professionals
Labor Unions
Guilds
Academics and Students
Public Sector
Legislature/Parliament
Judiciary
Administrative Bodies
Publicly Owned Companies
Other
Press/Media
Foreign Investors
Trading Partners
IFIs
Donor Agencies
7


5 Basics of Stakeholder Analysis
Determine the identity of all stakeholders
Rank them
Establish criteria for each stakeholder
Determine the status quo according to the stakeholder's criteria
Compare to understand the respective stakeholder populations
8


Stakeholder Analysis Application
Based on the above overview of stakeholder analysis, please answer the following:
1) How would you use stakeholder analysis to promote a sustainable market for C-LIR with respect to
competition law
collateral law
2) Please provide examples of where and when stakeholder analysis has been used effectively in either your country or countries that you have worked in.
3) Has stakeholder analysis been used effectively to promote C-LIR in your country?
9

IV. Breakout Sessions

B. Background Papers

Workshop Session 4B: Can Market Forces be Harnessed for Sustainable C-LIR Reform?

Breakout Group3: ***Top Down vs. Bottom Up, Endogenous vs. Exogenous - Do Integrated Approaches to C-LIR Really Deliver?***

> "How do you manage to stand up there?" asked Milo. . . .
>
> "Well," said the boy, "in my family everyone is born in the air, with his head at exactly the height it's going to be when he's an adult, and then we all grow toward the ground. When we're fully grown up, or as you see, grown down, our feet finally touch. Of course, there are a few of us whose feet never reach the ground no matter how old we get, but I suppose it's the same in every family". . .
>
> "Oh no," said Milo seriously. "In my family we all start on the ground and grow up, and we never know how far until we actually get there."
>
> Norton Juster, *The Phantom Tollbooth* (1961)

The legal reform process starts from the recognition that the existing legal regime is in need of change. While this extremely obvious observation provides little room for argument, bringing about that change is not so simple. Endogenous legal systems are the product of history and culture, yet most legal reforms being recommended today come from international, exogenous models that may not fully comport with local demands. The inherent tension in bringing local reforms into line with international standards has brought about different approaches to reform.

One strategy for "modernizing" commercial law can be characterized as "top-down", in which national leaders, often under pressure from one or more international institutions, insist upon and obtain adoption of a new, foreign-based law. The advantages of this approach are speed, efficiency and cost -- foreign experts can work relatively quickly with a small group of local experts to adapt model laws sufficiently for adoption and passage, at relatively low cost. There are disadvantages, however, usually found at the implementation level. Numerous well-crafted framework laws never get off the paper they were printed on. This may be due to overt resistance to change at lower levels of

government and civil society, or simply represent a lack of understanding that impedes implementation. In any event, top-down reforms seldom reflect a broad sense of ownership by a wide variety of stakeholders.

Another approach to legal reform is to work from the ground up, capturing stakeholder demand for change at the grass roots level, and turning that into proposals for legal reform. This can be effective where the broader civil society and their leaders and policy makers have the same goals, but does not necessarily lead to the improvements intended. First, failure to enlist upper level "champions" who can ensure that the demands lead to legislative response can produce resentment, disillusionment, apathy and political problems as the reformers hit the brick wall of those to be reformed. (In Thailand recently, a judicial reform project was cancelled when the generally young reformers did not enlist the support of the entrenched old guard who did not wish to reform.) Second, numerous interest groups would like to see a return to price controls, import controls, restrictive and excessive licensing requirements and other anti-competitive, anti-market policies. In the increasingly global economy, no country can afford to be an island, yet endogenous reform can lead in that direction.

Clearly, the demand for change must come both from above and below, and must meet some international standard to avoid marginalization. If only from above, laws will seldom be implemented. If only from below, they will not be passed into law. Without international norms, reforms may be dangerously misdirected.

USAID has recently used an integrated approach to legal and policy reform in the transportation sector of Southern Africa to address these issues. Under a five-year program, USAID assisted a regional institution to lead a wide-ranging policy initiative in twelve of the countries comprising the Southern African Development Community (SADC). While the regions -- Africa vs. Europe and Eurasia -- and the sectors -- transport policy vs. commercial law -- are certainly quite different, the approach may still be useful in other areas.

In the SADC project, USAID started by providing support to a recognized indigenous leader (the Southern African Transport and Communications Commission - SATCC) charged with regional reform. SATCC then conducted extensive participatory, consultative meetings with a wide range of public and private sector representation to obtain a general consensus on reform needs. Using this input as a foundation for change, technical experts supplied by USAID assisted local counterparts in drafting a general protocol for the region, within the context of international standards and requirements (such as WTO concession requirements, for example). SATCC then vetted the draft and revised the protocol three times before submitting it for adoption and approval. Once adopted, each of the twelve signatory countries began a process of

internalizing the protocol by enacting national legislation and policies in conformity with this regional agreement.

There have been substantial positive results from this project:

- The protocol was passed and ratified in record time for the SADC region because it captured regional demand for change;
- National agencies responsible for national implementation accept their responsibilities and see themselves as champions of change;
- The implementation structure formally includes private sector participation and input;
- The cross-sectoral consultative events have increased understanding by government officials of private sector needs and economic impact of government actions;
- The cross-regional consultations have helped each country to understand the inter-relations between national policies and regional economic impact and the need for change based on the regional context -- "think regionally, act locally;"
- The combination of technical expertise based on international models and local input has created a framework that responds to the global market and to local demand.
- Public and private sector are actively working together to ensure implementation of policy reforms.

On the other hand, the project took five years and $12 million, and no single reform has been completed. Of course, this project focused on twelve countries simultaneously rather than one at a time, but even so, the process has been slow and relatively expensive, with more time and resources needed to bring about substantial implementation.

In another African USAID project, top and bottom were brought together in a single country to look at barriers to commercial activity, with very clear results. The Trade and Investment Promotion Support Project (TIPS) of Guinea-Bissau conducted a national workshop on law and commercial activity that identified priority areas for reform, a commitment by government to make those reforms, and eventual implementation of the changes. In this case, TIPS worked with the national Chamber of Commerce to conduct meetings of public officials and the business community in each region of the country prior to the national workshop. When the national meeting took place, participants worked together to identify priority constraints and possible solutions. As a result, the Ministry of Commerce was decentralized, the incorporation process was streamlined (from one year to two months) and notarization requirements were simplified. The process captured demand, and the demand led to change.

***For Discussion*:** Recognizing that Africa cannot necessarily be compared squarely with Europe and Eurasia, are there elements of these African initiatives that can be replicated in the transition economies of the countries represented at this workshop?

Session 4: Can Market Forces Be Harnessed for Sustainable C-LIR Reform?

Have the reform programs of the past 5-10 years effectively produced legal reforms that capture both globalization needs and local demands?

What methods can be used to ensure that the private sector has adequate input into the reform process?

Are the national initiatives underway sufficiently regional in outlook to avoid unnecessary clashes between potentially competing national policies?

Can the countries represented at this workshop afford to employ a slower, more expensive consultative process? Can they afford not to?

IV. Breakout Sessions

B. Background Papers

Workshop Session 4B: Can Market Forces be Harnessed for Sustainable C-LIR Reform?

Breakout Group 4: ***Toward Creating a "Virtuous Cycle" of Reform -- A Market-Based Approach to Creating a Business-Friendly Regulatory Environment***

The innovator makes enemies of all those who prospered under the old order, and only lukewarm support is forthcoming from those who would prosper under the new.

Niccolo Machiavelli, The Prince (1513)

"[L]iberalization of the business environment can be a powerful catalyst, setting off a virtuous spiral whereby each reform makes the next one easier… The challenge is finding a way to set this virtuous spiral in motion."

World Bank. World Development Report 1997: *The State in a Changing World,* p. 63.

Overview:

Many countries with weak institutional capability are saddled by their history with governments whose reach is overextended. Certain functions are obviously governmental in nature, such as a foundation of lawfulness, a stable macroeconomy, minimum standards of public health and primary education, adequate transport infrastructure, and a minimal safety net. Yet many states do not provide the essentials but are overproviding a wide variety of goods and services that private markets could provide in their stead.

Governments must work with the private sector to promote economic development, most notably by providing a regulatory framework to support growth and competitive markets. Yet in all too many countries, state and market remain fundamentally at odds. Private initiative is still held hostage to a legacy of antagonistic relations with the state. Rigid regulations inhibit private initiative. And state enterprises, often buttressed by monopoly privileges, dominate economic terrain that could more fruitfully be given over to competitive markets.

The challenges of scaling back the overextended state are as much political and institutional as they are technical. Success relies on the ability to proceed with reform in the face of opposition from powerful groups who benefit from the status quo.

In development literature there are two competing paradigms on the theme of creating a business-friendly regulatory environment. As the World Bank's World Development Report for 1997 makes clear, reform can be catalytic. As the business environment strengthens, the range of opportunities available to entrepreneurs, bureaucrats, and workers increases. Correspondingly, political opposition to dismantling dysfunctional rules and agencies and liquidating and privatizing state enterprises lessens. But as the World Bank Report also points out, at the outset those who prosper under the dysfunctional system will have much to lose, while the eventual winners are unlikely to have reached the critical mass needed to lobby for their own interests. So how to put this "virtuous spiral" in motion?

The other paradigm is more cautious about the "demand creates its own supply" view of policy reform. This viewpoint is well explained in the European Bank for Reconstruction and Development's Transition Report for 1997. The EBRD Report recognizes (p.56) that institution-building in transition economies is a powerful way to create private sector demand for reform. Privatization and other policies that reduce the role of the state in economic life are important in their own right and are also tools to foster institutional development. But the EBRD Report warns (p.56) that this "'demand creates its own supply' view of institutional development runs the risk of creating institutions that are designed to serve, or are 'captured' by, particular vested interests." The Report gives the example of enterprise managers lobbying government to stifle potential competition, to oppose the introduction and/or enforcement of new tax systems, and to prevent new outside owners buying into their firms or gaining additional economic power.

The EBRD Report concludes (p. 57) that to be credible, government institutions must have certain attributes to promote entrepreneurship and growth. The bottom line is that "government institutions (including tax and licensing systems) are designed to facilitate the entry of new products, ideas and firms into the market place, a competitive environment and the exit of enterprises that are not commercially viable."

Even though opposition to reform may be deeply rooted in a country's institutions, this need not be fatal. To the contrary, close examination of the impediments to reform yield three pieces of practical advice to reformers. The first is that windows of reform opportunities do open; they tend to be those times when the normal rules of the game are in flux for some reason, however temporary. Thus, radical reforms have often been undertaken in response to an external threat or economic crisis, or during the "honeymoon" period of a new administration or regime, when incumbents with a strong vested interest in the old system have been displaced.
The second lesson is that, given such an opportunity, reformers can make the best use of the time available by adopting a strategy that understands the likely obstacles and seeks to mitigate them. Tactically designing and sequencing the reforms can help, as can measures to make institutions less susceptible to capture by special interests and gridlock, and, perhaps most important, building a consensus in favor of reform.

The third lesson is that breakthroughs rarely happen by accident. At any given time, the forces favoring the status quo are likely to prevail. Reforms only succeed if they are directed by leaders with a clear vision of the ways could be, and a contagious determination to turn that vision into reality.

Topics for Discussion

1. Are the two paradigms in conflict? Which is the more compelling?

2. Does the concept of a "virtuous circle" of commercial law reform make sense and if so, what is the best way to put it into motion?

3. Is a "go slow" approach to policy reform at the outset desired or a more aggressive start?

4. Efficiency-enhancing reforms are often difficult to implement because they create both winners and losers, and there may be no way to compensate the losers. Defusing opposition is even more difficult when the efficiency gains are low relative to the redistributive effects. Applying a rough political cost-benefit ratio to reform measures can show how much redistribution takes place for a given amount of efficiency gain. Would this analysis improve the prospects for commercial law reform?

5. Does the "demand creates its own supply" view of institutional development run the risk of creating institutions that are designed to serve, or are "captured" by, particular vested interests? Would this undermine sustainable growth and the reform constituency by diluting the ability of new firms to compete with those already in place?

6. What do you think of the three lessons of practical advice for reformers?

Key Readings

European Bank for Reconstruction and Development. 'Growth in Transition Economies: Sources and Obstacles." Chapter 3 in *Transition Report 1997.*

Rubin, Paul H. "Growing a Legal System in Post-Communist Economies," *Cornell International Law Journal*, 27 (1): 1-47.

World Bank. "Fostering Markets: Liberalization, Regulation and Industrial Policy." Chapter 4 in *World Development Report 1997: The State in a Changing World.* New York: Oxford University Press

V. Summary Conclusions

The success of the Workshop can best be demonstrated by the response of participants: prior to departure, three Missions had requested assessment, others were discussing when an assessment would be appropriate, and at least one multilateral institution had requested a brown bag presentation. In short, the participants bought into the method and the results.

The most important outcome, then, is that the diagnostic methodology has been validated both for results and approach. It is seen as a tool that Missions and other institutions can use to support and further their work in the area of commercial law and institutional reform. It is also seen as having cross-cultural applicability, in that the countries examined represented very different cultures, levels of development, and legal histories. Based on this approach, it seems that the methodology would work effectively in Latin America, Africa, and Asia, although some local modifications might apply. (There is still wording regarding the European Union as a major trading partner, for example, that should probably be supplemented or replaced in other regions.)

The second principle result is that the methodology has been refined and improved. The comments and analysis provided by participants at the Workshop were critical for revising the indicators into a more focused and tailored instrument of analysis. The results of the next field should have an even higher level of accuracy and validity among the users.

While less tangible, there was a strong sense expressed by the participants that the discussions will have a positive impact on their own work. Aside from any evaluation of the diagnostic assessment tool, participants re-examined their own development models from a number of angles. Topical breakout sessions engendered debate on issues ranging from the highly philosophical to the highly practical, and left many participants looking for more answers and new approaches. This impact should not be undervalued, even if it is as difficult to measure as some of the dimensions of legal reform itself.

VI. Next Steps

At the Workshop, several follow-up steps were planned:

- Preparation of a Workshop Report
- Revision of the Indicators
- Additional Field Testing
- Creation of a C-LIR Diagnostic Assessment Handbook

This document represents the completion of the first item, which will be distributed to all workshop participants and a number of invitees who were unable to attend.

This document also fulfills the second item. The indicators have been revised in accordance with the general and specific comments received at the Workshop. These new indicators are included as Chapter III C. These also include a Supporting Institutions Matrix in response to requests for more specific identification of the actual institutions being examined.

Since the Workshop, the revised indicators have been field tested three times: in Croatia, Macedonia, and Albania. In Croatia, the diagnostic assessment team also tested the methodology by adding team members from another organization: the Federal Trade Commission will send representatives to field test the competition methodology. This has helped to identify "insider blind spots" -- that is, those areas that have not been sufficiently explained because the team has internalized the process after four assessments and may not be aware where questions or approach are unclear to new users. The methodology has been re-evaluated and revised based on experience gained in these assessments.

Booz·Allen is also preparing a Handbook for use with the diagnostic methodology. This will be written and revised based on questions and experiences garnered from the Workshop and additional assessments, and will be produced by the end of December 2000.

VII. Excerpted Transcripts of Workshop Proceedings

A. Peer Review

1. Presentations on C-LIR Diagnostic Methodology

ALEXANDER SHAPLEIGH:

Our objective during the day is to have as much of a dialogue as possible, not so much speeches that I'll make or anyone else is going to make. There's a certain amount of material to present, which we'll do. This is what we're trying to call a peer review. That sounds like a fancy word, but basically, most of us in this room are not nationals of the countries that we're working with here in the transition region. We thought we would spend a day trying to compare notes with each other, try to see where we might have common ground with the various organizations that are represented here on the tables today, and maybe avoid going over some of that same ground in the next two days after this, as we get into more of a creative dialogue with our partners and friends from the countries of the region who will be talking more specifically about the situations in their individual countries.

Since we do have a relatively large group right now that has come for this day, I thought it would be worth taking ten minutes to allow each of us to stand up for 30 seconds or so and tell us who you are because we don't all know each other. There are a lot of people here from the USAID Missions, but also from the OECD, from some of the universities, from the World Bank and from some of the other U.S. Government agencies. If that's okay, I think it would be worthwhile just to put a name with a face, and then I'll make some initial remarks here at the start. **Nick Klissas**, who is my colleague from USAID will follow, and then **Mark Belcher**, with our contract team from Booz-Allen will finish up to the point for the morning break. Then we'll go on from there.

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The agenda you received says that I'm going to talk about goals and objectives, but I think what I'm going to cover mostly right now is just some of the inter-relationships that I see between the various organizations we've helped around the table today, and just kickoff the discussion that way.

Nick Klissas and Mark Belcher will give the details of the more specific goals and objectives of the workshop when they make their presentations.

VII. Excerpted Transcripts of Proceedings
A. Peer Review

In this part of the world we just finished changing the name of our organization. We used to be called the Europe and New Independent States Bureau. Now it's the Europe and Eurasia Bureau, which I think is an interesting change of phraseology. The big change there is the new and independent states. I think no one wants to think any more about these countries being new. After all, they've been existence now for about 10 years. We're not so sure about the phrase Eurasia, but that's one that is commonly in use among some of the other organizations here today. We've also changed the name of the office that I am associated with within our Bureau which is now being called Market Transition, which is a little more broad phrased from what we used to call ourselves, which was Privatization and Economic Restructuring. These words tend not to be readily meaningful except to the initiated, but Market Transition captures a little bit better what we're about at USAID.

Broadly speaking, USAID has a strategy that covers more than just economic policy. Basically three strategic areas we work in, familiar ones – economics, politics and the social sector -- and of course, the inter-linkages between the three. This is something pretty obvious, but to remind you that we're only dealing with part of a much larger equation here. In our strategies around the world we do rely on various types of what we call partners. One type is certainly the other U.S. Government agencies that we work with on different subject matters. The Department of Commerce has a representative here today, **Igor Kavass**, and that's certainly vital to us when we're trying to support trade development and particularly the process of accession to the World Trade Organization. We have **Jim Hamill** from the Federal Trade Commission working on competition policy.

On the private sector side, I mention briefly the ABA, the American Bar Association's program. No one today is around the table but they will be tomorrow from the ABA CEELI group, and clearly, probably the premier party on the private sector side that has been working on commercial law in collaboration with USAID for many, many years. And various universities, and certainly contractors under contract to us from private institutions, including Booz-Allen and many others – the University of Maryland are with us.

Commercial Law Reform clearly is part of a much larger whole. You can say, in a sense, it's within the economic domain, but it's also within the democracy and political domain. There are many, many cross-cuts when we talk about all these subjects.

I remember about a year ago we had a big conference that some of these same people here were attending back in the Washington area on the linkages between legal and institutional reform from an economic perspective on one side, and the rule of law understood as the development of the judiciary and the court systems on the other. We tried to tackle a theme which will come around quite a bit during this workshop as well, which is how do you marry the agendas of the economic growth demands and the need to pursue democratic reform on the other. Look at an example of how we are doing that, which we might learn about a bit more, is a project AID has started in Armenia. **Fred Claps** in the back row there might report a bit more on that, where we tried actually to marry these two sides of commercial law development in a single project, the economic side and the democratic progress side.

Other cross-cutting themes which will certainly get expressed during the course of the workshop – one of them is corporate governance. Corporate governance can mean almost anything. If it's interpreted narrowly, it's company law, pretty much. Broadly speaking, it's the entire economic policy of reform. Especially as it relates to company law, I think we'll come around to the concept of corporate governance and where it fits in current agendas.

And the last cross-cutting theme which is just a reminder to put on the table is anti-corruption. Every time we talk about anything there's a corruption or an anti-corruption element to it. And I think that's certainly the case with commercial law reform. As commercial laws are better put in place, better utilized and followed, what will follow is a greater reliance on the law and some reduction in corruption as a means of doing business.

Next point I want to make and this might be important, why these seven areas of law – why is that the focus of this workshop. It's a bit arbitrary. It comes down to a division of labor in the way we organize our business at USAID. Essentially the division that I'm responsible for covers these seven areas of law – company, contract, collateral, bankruptcy, competition, trade and investment. What's left out of that – accounting, privatization, banking, capital markets, many other areas, all of which inevitably are going to find their way into our discussion. But we organize our work that way, and that's why we particularly organized the work for this workshop and the background efforts by Booz-Allen along those lines.

All of the technical offices at USAID have a common mandate, and that is to attempt to come up with measures whereby we can answer a key question which is, when is enough, enough. When can we say that the commercial laws in these seven areas in particular are sufficiently in place, being implemented, being utilized, understood and being enforced in a system so that at least the United States Government, which we represent, can begin to feel comfortable about ceasing our technical assistance. We know that other agreements will continue for the longer term.

We did a contract with Booz-Allen & Hamilton. It was competitively bid. They were the winners of a competitive bid [underway for] the past year and a half they'll be explaining more of the details. They've been about their work with us, working closely with us to do some diagnostics in the countries that you've been reading about, and to come up with their methodology and framework for getting at these questions of measures on commercial law.

One of the key things we want to do here is to see what chords we strike with other organizations, the OECD and the EBRD and the World Bank particularly today for this session, where similar work clearly has been going on for a long time, some of it at much greater depth than ours. I'll return to some of those comments as soon as I finish my remarks.

I'll try to telescope the rest of what I have to say to stick within our time limitations – just some geographic and geopolitical points. This might be obvious, but just to make sure we put it on the table.

We are at the 10-year point after the transition process began. What we call the Northern tier countries from the Baltics down to Slovakia and the Czech Republic, we feel that, for better or worse, the transition period is coming to a close. We know it's never over, but for USAID purposes, we are essentially not going to be working for much longer in the so-called Northern tier countries of Eastern and Central Europe. The process of accession to the European Union is fairly well advanced for these countries and they're likely to – maybe not all but most of them – be admitted to the EU during the next decade. That seems to be a pretty safe bet.

Regarding the Southern tier, the countries beginning with the former Yugoslavia and downward, what we call the Southern tier, others call it the Southeastern Europe area, the Balkans. Clearly, there's a new intensity there, with Kosovo and Serbia and the problems of the last year. On the U.S. Government side we have a thing called the Southeast Europe Initiative, which is a way of pooling funds to begin to increase our effort in those countries. On the EU side, there's certainly a EU-led Stability Pact which many of us are engaged with as well. And within the Stability Pact, there's the Investment Compact where the OECD has been given a special role to lead the Church on that in the Balkans. We expect USAID to be in the Southern Europe Area for at least another five or ten years. As far as the EU accession is concerned, it's anybody's guess, but certainly it appears that for most countries if there is accession it will come after the Year 2010.

For the rest of the region, again we used to call it the New Independent States, and we're searching for a better phrase, Eurasia, the CIS, the Former Soviet Union. Clearly the transition will take a lot longer, we all know that. And it probably is going to evolve into a longer, term development effort –more classic one that USAID's been involved with in other regions of the world, and move away from the strict transition concept. Again, assuming that assistance is requested by those countries from us, and there's a clear goal, that is, a sustainable market economy is the objective. WTO accession is probably the more appropriate goal for these countries and the former Soviet Union. We know that the Kyrgyz Republic and recently Georgia, have been most recently recommended at the Seattle Meetings. I guess they found time at the Seattle Meeting to admit a new member. But Georgia and the Kyrgyz Republic are now the two countries in that part of the world that are formal members of the WTO. And Igor and others are trying to see if they can find a way for Ukraine and some of the bigger ones to make their way in.

I'm going to forego some background quotes and the like that I have prepared. What I was going to do was simply – I can bring this back, perhaps, if time permits – a lot of the work that has been going by other organizations. I haven't mentioned the Asian Development Bank yet, [which has prepared] a major study on Asian countries on the question of the relationship between legal reform and economic grown in Asian countries over the past 30 years. An interesting experience there, which basically dovetails with our own sense of what it takes to promote commercial law development, but again, I think I'd better skip over that, just because we're going to be compressed for some time.

I was also going to mention some of the work by the World Bank, which, again, I'll come back to. **Cheryl Gray** is one of the people who have written quite a bit about this and I had some words from her, and of course, **Douglas Webb.**

I'll end my remarks by just bringing to the group's attention and putting on the table, some of the more important projects and studies, some of which have been completed already. Others are currently underway by the OECD, the EBRD and the World Bank. I'm sure I'll miss some of them, but just to be sure we are a little more aware of some of the other worth beyond USAID that is out there. All of these aim at generally defining and measuring good commercial law regimes for the transition countries. One for sure is the work by the OECD on company law which is *1999 General Principles of Company Law in Transition Countries*. I am not sure if everybody knows about this work. It's basically a good primer and it lays out all the basic elements of good company law, and it's not that dated. It's fairly recent. The work might have been done some time ago, but it was just printed in 1999. Another OECD project which I just became familiar with after a recent trip to Paris, is the *Framework for the Design and Implementation of Competition Law and Policy*, which I got from **Joe Philips** and his group. There's a tremendous amount of work that is represented here and in other documents that I got from their office. This one specifically was a joint effort by the World Bank and the OECD. If you look through this, it lays out pretty much the elements of good competition law and policy that I hope are reflected reasonably well in the Booz-Allen work that we've done.

On the subject of corporate governance, there was the launch for those who may not be fully aware of this of the global forum on corporate governance, a major new initiative by, again, the World Bank and the OECD at the recent IMF World Bank meetings in September. That was in some ways based on another publication which I don't have right here today with me by the OECD, *Principles of Corporate Governance*, and a lot of other work on corporate governance is around and John and others might be able to relate some of that to us as we go through the day.

Just three more. On the EBRD side, in the annual transition reports, which is an annual publication of EBRD – I think we're almost all familiar with it but just in case –it's a score card written as part of a overall scorecard on the economic reform in the transition countries. Part of it is a legal indicator survey that gets into the details, particularly of pledge, bankruptcy and company laws. That's been going on since 1997, and the EBRD has a very interesting scoring method of basically looking at the extensiveness of a given law. That's basically the first admission of what we will be seeing in the Booz-Allen methodology, on the one side, and the effectiveness of the laws of implementing laws which is the second, third and fourth dimensions of what will be presented shortly by Booz-Allen, and we want to compare some notes on that. There's also an excellent paper on the most recently completed survey work at EBRD by Anita who is here with us today, and her colleague, David Bernstein, who will come tomorrow on company law and particularly how it relates to corporate governance which was in the August 1999 issue of **Law and Transition,** which is one of EBRD's regular publications. There's a very, very interesting – we haven't seen it yet – a thorough survey on secured transactions which the EBRD is about to finish and publish. The EBRD, of course, has been engaged in that area for a long time, going back to about 1992, and when David is here tomorrow he probably will

give us an update on that. There's a lot of detail on what it takes to put in place a good secured transaction's legal regime, which I hope is reflected in our work. I understand one these examples with the World Bank, just one of many, the most recent symposium on insolvency that was conducted this past September for a large audience. Many in this firm were there, and that is leading to a search for international best practices and bankruptcy.

This comes down then, to a common question for the workshop. And that is, how well do all of these other projects fit with what we've started here at AID with our partners, Booz-Allen & Hamilton. How does the methodology that will be presented here reflect or incorporate these other works? Our goal – I was saying to somebody earlier just before we started is not to completely reinvent the wheel. We would be wrong in doing that, as I think any of us would be. We want to adjust, simplify, possibly expand, maybe add some complexity to our measures and do seven commercial arias so we can get it right as possible.

And my own vision, finally, is at the end of all this, I'd like to look for ways to merge what USAID is doing with our fellow organizations, the EBRD, the OECD, and the World Bank. That could take the form of natural financing of those organizations to carry out some of this work in future, or in other ways just to do it in parallel so that we're all basically working on the same wavelength. I'll end my remarks there, and hope I haven't taken too long.

NICHOLAS KLISSAS:

Again, my name is Nick Klissas from USAID, Washington. I just wanted to give you a couple of brief remarks so we can let Mark get up and start our first presentation.

Today is our Peer Review and this makes for a very informal, working group that we have today before our actual workshop starts tomorrow and the day after. Today, we will go through our initial presentations and discuss what the methodology is about, how the indicators were developed and what our findings were in the different subject areas, and also in things called the dimensions. We are going to ask you to go into break-out groups, and basically be our judges. We want you to give a good, hard look at the indicators and the methodology, and tell us from your experience whether what we have put down on paper makes sense to you. For example**, Jim Hamill** and **Joe Philips** are experts in competition policy should scrutinize what we have there and see whether the scores and the results that we've gotten from all the countries make sense to you, because you have a good working knowledge of how these countries that we've assessed have done in the competition policy field. That's a reality check.

For the rest of the morning, Mark Belcher is going do an overview of the methodology. There's going to be a break for lunch from 12 to 2. From 2-3 there will be a read out of subject area and cross-country findings. At 3:15 to 4:30 we will have the breakout sessions. We will be clustering into several different groups. So group one will consist of bankruptcy and collateral law and **Gerry Zarr** will be the facilitator in that. Also, we are going to ask **Jim Neely** if he can be the rapporteur for that group. Group two will be contract and company law and **Wade Channell** from Booz-Allen will be the facilitator, and **Anita Ramasastry** and **Peter**

Yanachkov, if you're agreeable, can be the rapporteurs for those two subject areas. Competition Policy will be facilitated by **Marc Hersh** from Booz-Allen, and we're asking **Jim Hamill**, if you're agreeable, to be a rapporteur for that. Trade and Foreign Direct Investment will be facilitated by **Mark Belcher** and **Srilal Perera** and **Igor Kavass**, if you would agree to be rapporteurs for the big group afterwards. We will have the groups reconvene back here at 4:30 to 5:00, just to give a brief, overview to the assembled crowd in here.

Some of the objectives that Sandy mentioned that we are seeking to get out of our Peer Review and also the workshop, is to refine the methodology and the indicators, so that we can achieve some kind of consensus on their validity. I hope that we will be able to use this approach in the future from time to time by USAID Missions. Perhaps other donor organizations could also use it. As we undertake assessments, we want to take a snapshot of how the countries that we work in are doing in the commercial law area. We also want to be able to use this methodology as a guideline to graduate a country from certain projects. Another objective, and we are achieving that right now, is to get experts from different countries talking to one another, not just in one commercial law topic, but across many of them, because I think we have a lot of issues or problems that we have to face in developing commercial legal regimes. And we can all benefit from each other's experiences. Lastly, I hope that we can achieve some kind of consensus and have people buy into what we've put together.

Just some ground rules. Unfortunately we're already going over on time and I don't think we have enough time left for Mark, but I do want to try to keep as close as possible to the schedule because I think it's unfair to have very short breaks or no breaks at all, and eat into some of the free time that we have. On participation, I really encourage everybody to participate. This is meant to be an informal peer review session, so please make interventions. If we can't get to all the questions and we do have to return for breaks, please continue the conversations during the breaks or in the evenings or during lunch, etc. We want this to be an informal workshop. It's not meant to be a stuffy conference. Are there any essential questions that you may have about where we go from here? Otherwise I'll let Mark Belcher take the floor.

MARK BELCHER:

Let me say that I think we're very fortunate to be here. Sandy and Nick have given us a license for 18 months really to start scratching at some of the most pernicious of the issues relating to development in general, cast as commercial law development, but really you'll find, I think, as we go that these issues really go to the heart of why it is so hard to go through the process of transition. And it's given us great freedom and latitude, the idea is give them enough rope and they'll hang themselves, and I think at this workshop you'll either going to see us swing or maybe walk to the gallows. We invited you here not to talk to you but really to enter into a dialogue. We tried to get as much diversity as we could geographically, technically, organizationally, and although we're heavily lawyered here, except for that, I think that when we were introducing ourselves, you might have picked up that we really tried to reach out and bring together a diversity of experience, a diversity of technical knowledge, a diversity of geographic specialization. That's the only way we can pull this thing together is to have the benefit of your

expertise and your experience. Even though we're arranged in a rather formal setting right here, I plead with you, I encourage you to speak your mind. If something sounds hollow, it doesn't work, please let us know, because that would be the kernel around which a dialogue can begin. Hopefully, we can gain insight from it. No one has a lot on how to do it. No one has the answer here. What we try to do is to come to this with an open mind and attack a very difficult problem in a new way. I don't think any of us could claim that there's something here that's never been thought before or said before. We're trying to bring things together without prejudging, and say, hey, what about this, can we approach this in a slightly different way. During the next couple of days it will be rather intense. We have a lot of territory to cover. We're already over time. I hope that you'll join in that spirit with us and as a team all of us try to move this issue a little bit forward and maybe take away something you didn't have before. That, from our perspective, would be a huge success.

Audience:

Mark, one question. Regarding Germans, British, the Dutch, and so forth—will we have any information about what they've been doing in these areas?

MARK BELCHER:

Well, I think that's a good question. There are many players in this business. We tried unsuccessfully to get representatives from the EU here. That's a major gap that you'll see. I see this as a beginning of a dialogue. We hope to do brown bags for the World Bank, if **Gennady** will help facilitate that in January. There are many players. Again, I think if I could use a simile from the software industry, we're doing baby testing right now. You're going to see the methodology for what we're doing, and then if we all tend to agree that this has some merit, then we will roll it out for others. Now, I'm going to take you through the Indicator Development. It's a little dry. I'll try and make it go fast for you and get us out so we have a break. It's key to explain why we did what we did and how we did it. There's a lot of compromise. There's a lot of approximation here. I think unless we take the time at the beginning to explain a little bit of how we ended up where we are, we might get mired down with a lot of questions about how silly this is. Are we ready to go?

A designing indicator is a process of approximation compromise. I found this quote that really sort of tickled me, referring to the artist, **DeKuning**, Igor Stravinsky was asked his opinion about it, just as we're asking your opinion about this. When he was told it was the work of a famous artist monkey, he said, yeah, that's terrific, so with that spirit we begin.

The trick of developing indicators lies in the ability to identify an object of position, which it found to exist or not, provides reasonably reliable indication of the existence or absence of another object or condition. Welcome to the theory of indicator development. It's pretty dry. You're saying, I can't do the thing itself, so I have to figure out something else like looking in a mirror, and saying, okay, I will use the reflection that I can see easily of the distant mountain, rather than travelling to the top of that mountain. I didn't know that, and I don't think any of us really appreciated that before we started this work – how very difficult it is to figure out what

you can look at quickly and easily that will reliably indicate to you that something else is going on.

We had certain parameters that were given to us. For very practical reasons we wanted, and USAID wanted, to be able to do a diagnostic analysis that was comprehensive but quick. We had to develop a methodology or a tool that someone could come in and get it done in a cost, effective way. These are like fresh fruit. They have a certain shelf life, and after that, they become less and less meaningful. So if you spend a year or 18 months as we have doing four assessments, so you want to able to go in and do an assessment in two to three weeks, get a good picture, and maybe use that assessment, that same methodology, a year later. Say, okay, where did we start and where are we today? We want to look as best as we could comprehensively at these areas, not just in terms of what does the law say, because I think that is rather dry, and except for areas of specific experts, it's not particularly relevant. Our focus is this. Why is it that these laws are not being implemented and enforced? Why is it that it's so hard to get a bankruptcy law actually working? If you boil everything we're going to do down to one phrase, that's it for this workshop, and we need you help in figuring this out. We want to be able to compare cross-regionally in subject matter areas. Is it possible, we ask ourselves, to compare the development of bankruptcy with trade, or competition with collateral, or Poland with Romania, or Ukraine with Kazakhstan. One of the things you're probably thinking, is, wait a second, we all know the historical antecedents and the differences between Poland and Kazakhstan. How can you come here and tell us that you can compare these two? Well, we'll see if we pull that off. This is a tool, too, and this is a key. We want to develop a tool that would help USAID primarily, but other donors or development professionals, think about where am I going to put my money. Where am I going to get the most bang for the buck? When do I pull out? Who will provide a framework for making intelligent decisions? Not giving the answer but making an intelligent decision about where we go with that kind of question. Finally, as I mentioned, we want to benchmark the **value** – where we are today, and maybe a year from now go forth and do another assessment quick and dirty and look at the situation.

So we used 2-3 week, in-country diagnostics -- we did four of them as you know – the teams were two to three persons, supported by local experts, that's key. It's not three or four consultants parachuting, who know nothing about the country and nothing about the laws. We relied very extensively on our local, legal teams to support us. We interpreted what they told us. We double-checked what they told us through a series of interviews. But there's no way within these parameters to develop a comprehensive knowledge, an accurate knowledge, if you don't rely on people who live in that environment all the time. We emphasize using available public information rather than generating primary resource data. We didn't go out and do our own surveys. We didn't have the time and we didn't have the money. That's a very key limiting factor I'll describe in a moment. Data gathering was primarily through interviews. We go and do as an extensive a research and preparation before we got to the countries as possible. But while in-country, primarily we were doing interviews with individuals, not necessarily always on collateral or bankruptcy or competition, but on what is the reality in which you are going to operate. I'll get deeper into this. We didn't talk just to lawyers or just to government. We tried to talk everybody, so we tried to talk to all the State agencies, government, national government,

local government, bankers, a businessman on the street, lawyers who were expert in areas, NGO's, the donors, everybody so we could truth-test what we were hearing. None of the data that we developed came from a single source. We really tried to get that holistic approach.

Now this is a key point. From a definitional standpoint, and I'm sure some of you have already thought this, we tried not to make a normative standard of comparison. We're not comparing country's development for the EU. We're not comparing country's commercial development toward the United States, or Brazil, or Vietnam. Because, when you fall into that, you fall into a normative, one is better than the other. We very strenuously and assiduously stayed away from that. What we did is say, okay, where is that minimum threshold at which a modern commercial, market economy could operate with reasonable efficiency, reasonable efficiency. Now, I bet that's a subjective standard, and it's an arbitrary standard, but it's a standard that people in this business who are making these decisions have to judge. They have to say, where do we put our money and when do we get out? So, if you had a 100%, at about that point, you're thinking, it's time to go. That's the benchmark, if you will. Now, in this workshop we can alter that benchmark. In certain areas, like trade, for example, we might say, let's be more explicitly oriented to WTO's accession requirements. But it certainly doesn't make sense to compare Kazakhstan to EU standards because, in our lifetime, Kazakhstan is not going to be a member of the EU. And that is one of the primary challenges we face in saying, how do you benchmark across regions.

We want to try and use quantitative measures, as well. We started out and learned a lot of difficult lessons as we went. However, there are things you can look at -- that reflection of the mountain – that have numbers that are objectives. Where we could find the data where the data existed, we tried to use those. We didn't want it to be Margaret, Gary or Peter's opinion. We tried to create a standard that was going to be reasonably objective, given the subject matter. We want to balance specificity and generality so that a subject area expert would really be interested, for example, in competition law, to get down to the details. But somebody at the high-policy level, who really doesn't care about the details but does have to decide where we establish priorities regionally or programmatically could look. So there are three levels of indicators here, and I'll go into greater detail. We wanted it to be flexible enough to capture the organic or temporal nature of commercial life and commercial law. Again, it's an issue of shelf life. Nothing lasts very long, nothing is static in this. So we wanted to have a methodology where we could do an assessment on day one, and then two years later do the same assessment, and yet with some reasonable indication of what's changed, good or bad, in that period. (How badly am I on over-time?)

Data is a big issue. Poland had some pretty good data. Romania had some but not as much, Ukraine had a little less, Kazakhstan about the same. It's great that we can go in and measure organizational capacity with greater precision if we had the data. The fact of the matter is, the data doesn't exist, certainly not the kind we can get in a two to three-week period. If we invested a year in each place, we might have gotten the data we needed to make very definite decisions and/or interpretations of specific institutional capacity. That had to fall by the wayside because, again, this was designed to be quick and dirty. We were only able to get a certain

amount of data. If we got great data from Poland and we didn't get it from three other countries, the indicator went away. So, some of the specificity and the concreteness that we were hoping for originally went away because we just didn't have the data available to make it happen.

We want comprehensive indicators covering these 7 areas– it's a huge area. This is a huge subject matter to cover—several hundred indicators. Portability, we want to be able to compare apples with apples. Consistency, we wanted, again, to eliminate the bias by getting at the most micro-level, a simple yes, no proposition. Practicality, we wanted to make the most of the data that existed. Legacy, we wanted to have before and after comparisons. And then finally, utility. If our methodology isn't useful to people, it won't survive. It will go up on a shelf. It will be a nice report and that's the end of it. That's not why we did this. We hope that people who are focused on these issues will say, maybe I could use this to help myself figure out where I'm going to go with my program or with my project. Again, who might use this? Technical experts with a subject-matter focus, project officers, program managers, development professionals generally. I keep coming back to the notion of source code of a computer program. This is it. It's not something that's owned. It's not proprietary. It's something hopefully people will take, adapt, refine, improve, but most of all, use. And then, of course, policy makers and journalists and investors. People love to be able to say, Ukraine's a three and Romania's a five, **Azerbaijan** is a two. That's the reality of life, so we could try to do that – give something to everybody.

Now I'm going to get into a little philosophy. I decided how we are going to do this. If you think of the school of Pointillism where you take a picture and you take tiny little dabs of paint. Individually these points really don't mean a lot, but together we know that they sometimes do have meaning. Now here you see some smudgy, meaningless thing. That's that point expanded. So this is kind of what we did. We went down to the point and then we expanded it. These points can have coherence and/or meaning <u>if</u> we look at the broader picture. And that little frame there represents the point you just saw expand. Now we backed out and we see that this little point is part of a larger coherence. And to understand the picture, maybe our focus has to change. And that's part of the exercise we've undertaken. Here again, another example. That's really what we did to the indicators. If you think of what we call tier three indicators, they're very micro. It's those individual dots. We have a pyramid as I'll show on the next slide. You build up to a very general level and you see a picture. I see a lot of confused faces. Believe me, it took a long time to figure this out. Stick with me, trust us. I think it will make sense in a little while.

Here's the three-tier model. Think of it this way. At the third tier, the bottom of the – this is in the report so if you can't read the slide or the little details, it's in your report and you can refer to it later -- third tier indicators, we want minimal abstraction with direct measures and conditions using a variety of quantitative and qualitative indicators. So we're down there saying, is it a yes or a no, a one or a zero, black or white. Our idea was that you ask enough of these questions, even if you get the wrong answer on a few of them, the picture that emerges over time or through this data will actually yield something that approximates reality. Remember what an indicator is. It's not a scientific measure, it's looking in the mirror at a mountain. We don't

want to go to the top of the mountain. We want to look in that mirror and say, the mountain is snowing on top and I can go skiing today. The second tier is just a roll-up in terms of the abstraction. You take a bunch of these little ones and zeros and you moosh them together and we say, ah, at this is level we have a sum or an average that yields this. So a tier of three indicator would tell you, okay, in bankruptcy in Poland the secured creditor becomes fifth in line in terms of priority. Now if you're a bankruptcy expert that's really interesting. If you're a senior policy person you couldn't care less. So what we're trying to do at tier three, the bankruptcy experts saying, yeah that's the juice, I need that, that's good. Tier two is like, wait a second, I need to know about the bankruptcy, I need to be able to compare bankruptcy, collateral and competition, but I don't need to get the details. And then at the highest level of abstraction, you have a guy that wants to know whether Ukraine's a six and Kazakhstan's a two. That's the pyramiding effect that we've developed with these indicators. Stay with me, it's really not that bad.

An indicator is a point of reference or benchmark, whether qualitative or quantitative, against which a sample can be compared. There, textbook school definition. This is jargon – we've got our own little world and our own little group of terms of art in which you will hopefully become conversant with in the next couple of days. A reference value – this is an idea of a benchmark. We're comparing against an abstract benchmark, not the EU, not the United States, not Indonesia. So let's say it's a thousand, that's the reference, that's the maximum you can get for any indicator score. I'm just using a thousand, it's not the correct number. The raw score is when you go in and you do all the yes and no propositions. We add those up. Let's say the reference value is a thousand, and in bankruptcy in Albania we have 500. I'm just making it up. That's the raw score. But you see all of our reference values aren't 1,000. They differ because the subject matter area is different. So what we did is we said the indicator result is a percentage of that score. This is how to navigate the indicator scales. We got so wrapped up in this, we figured it's easy, and then somebody said, wait a second, this is the most confusing thing in the world. This is an attempt to help you navigate these tables and interpret them. They're not as bad as they look, and as we go through the next couple of days, I think you will become more and more comfortable with this. When you take data on seven areas, four-dimensions, in four countries, you've got a huge amount of complexity. The big challenge for us is how do we organize this in a way where somebody can really use it without doing extensive data search.

It's really important to make these points, I think. First of all, indicators are a reflection. They're not a substitute for critical thinking. We don't pretend that what you're going to see or hear during this workshop should be substituted for your own judgment, for your own experience. That's key. This is not a silver bullet. This is a tool. It's not a black box where you just put in data and it spits out the answer. That would be too wonderful, wouldn't it. We stayed away from normative standards of good, better and best, although they're implied. You'll see that Poland's scored better than other countries. That wasn't a surprise to us. Poland was selected as a benchmark. We went there first and we did it. Maybe that's a sign of subjective bias, I don't know. But what we don't want to do is say that the United State's way is the right way, or the EU way is the right way, although many of us might feel that. We stayed away from that. It's not a predictor of development outcomes. It doesn't say that what you find today is

necessarily going to be the case tomorrow. And finally, it's not a static, linear analysis. In other words, what we're doing is taking a snapshot of an organism under a microscope. The cell might split tomorrow. There are things in the report, certainly, that have changed since we did the analysis. Again, this is the way of capturing a picture of a very complex… So what we're trying to do in this workshop, and with this methodology is look at the different points, these different areas, and say to ourselves, can we better understand the complex whole. That's where we are. We're not talking about whether one bankruptcy law is better than another. We're really looking at the development challenge in its entirety. That's where we need your help. There's no answer here that I or any of us have been able to find, but I think where we're scratching at is that difficult issue of why it is so damn hard to get these things implemented and enforced. If you come away two days from now with a better understanding, then I think we've got an unqualified success. Welcome, thank you, and you'll be hearing a lot about this. Trust me.

(Break Time)

MARK BELCHER:

Again, we're on a very ambitious schedule here, so you'll feel the general prodding from time to time. We appreciate you're coming back. What you see here is a graphic of our schedule. We've successfully completed the first portion of the program. Now what we're going to do is take you a little bit more into the details. We tried to give you the rationale. There are some key concepts that we're going to share with you now. If you have questions, if it doesn't make sense, stop us and ask questions, please. Because if we get the foundation, if we get the beginning right, I think this will come together for you. If we don't have you with us, it's going to be problematic. With that said, I would like to turn the program over the Gerry Zarr our Minister of C-LIR.

GERALD ZARR:

As Mark says, you can't tell the players without a scorecard. On this one it's three generations and four dimensions. I'm talking about the first generation. What does that mean? The program says changing the legal environment. Okay, from what to what? Well, obviously, from law as an instrument of state control and central planning to laws that define the rules of the game in a market economy. Now you know that already, and I apologize for being so obvious, but we all have to be working from the same sheet of music, so I think I ought to go over that. What is the objective in this first dimension, which is changing the legal framework? Well, it's to get the rules right, so that the market will flourish. For the purposes of this analysis, this is called the First Generation Commercial Law and Institutional Reform, or C-LIR. Where do these new laws come from? Well, really, only two places – they're either home grown or imported. If they're home grown, they're either drafted from scratch or from laws that existed before central planning was imposed. Now that's all right for Central Europe and Central Eastern Europe and for the Baltics. It's not so good for the former Soviet Union and China, which did not have many of these – where the period of central planning was so long that these laws were not available. If the laws are imported, there is a risk that the transplant will not take.

Because after all local history and culture shape the way the legal systems work. Now in the example of the home grown laws which are reintroduced from where before central planning was applied, there's a famous example of the Polish commercial and civil code of 1864 and the commercial code of 1887 which were reenacted and modified.

A third approach is borrowing ideas from best practices abroad, and adapting them through local, legal drafting and political debate. How did these first generation activities do, i.e., changing the legal framework? The answer is mixed. Good laws are not easy to design or enact. Probably the most famous example is the Ukraine civil code. This was a seven-year, eight-volume activity to develop this civil code which is based on the principles of freedom of entrepreneurial activity, freedom of agreements and equality of all forms of property. It's a major effort that was funded with experts from Germany, Holland, USAID, TACIS and other donors. One of the things about law reform, it sometimes brings out the enemy, if you will, it provokes a backlash. And in the case of Ukraine, of course, there was the effort to sponsor a commercial code, or an economic code, which would govern physical persons and legal entities differently and would give the State certain executive powers in economic areas. The game is not over yet. The Ukraine civil code has not been enacted yet.

So what lessons have we learned from first generation? Well, one is getting the legal framework right. Is it necessary, but not a sufficient condition for sustainable market-driven economic growth? And the second is, that without supporting institutional framework and capacity, commercial laws cannot be fully implemented or enforced. So I guess this leads to the second generation, which Marc Hersh will take. Thank you.

MARC HERSH:

What Gerry just discussed became the basis for the second generation and the commercial law reform initiatives. During the second phase, practitioners' attention was focused on rationalizing and strengthening the institutional framework for implementation and enforcement of commercial and other laws. During the second generation initiative, important advances were made in institutional and operational analysis, regulatory design and capacity building. To address institutional deficiencies, the International Development Assistance Community marshaled policy advisors, technical training and limited equipment procurements. Let's look at the scorecard for the second generation effort. The record for success for the second generation intervention has been somewhat better, but still not what had been hoped for. Significant gains were achieved in certain substantive areas and some parts of the NIS/CEE, for example, in WTO accession, customs administration, collateral registries, and capital market development. But there has been little progress in others, notably in the enforcement of bankruptcies, anti-trust and intellectual property rights, although there has been some recent progress in the last. This practical experience in the field brought to light the complexity and subtlety of the institutional dimensions of commercial legal regulatory reform. In our surveys we have looked at both the institutional capacity of primary implementing bodies and the individual capacity, for example, regulatory and enforcement personnel.

One of the conclusions we have in this initiative of the second generation is that institutions have not been effective in carrying out their respective mandates because of capacity deficits. An example of the implementation enforcement gap that Mark Belcher referred to earlier…Let me define for a minute what I mean by institutional capacity deficit. Here we mean institutions building initiatives that are focused on the organization and its staff and designed to facilitate on implementing and/or a supporting institution and developing the capacity to optimally fulfill its legal mandate, that is, to administer and interpret and enforce and implement.

A recurring theme that we have seen in our surveys – and it doesn't matter which geographic area we were looking at, which country or which substantive practice area we were looking at -- we found basically seven recurring themes in terms of the capacity problems. I've summarized them here. Resource capacity to do the job. (By the way, our survey results are matched by recent OECD analysis of what's happening in other regions of the world, and the former Soviet Union areas.) Many of these institutions simply do not have the resources to do the job effectively. The result is that as we see as we go down the line, there's a problem in attracting and retaining the right people. Incidentally, that is not just an issue related to funding. That also has to do with the prestige associated with the organization. In our survey in Romania, for example, we found that there was a substantial problem associated with keeping people as judges because they looked upon that as low prestige-type of application of a legal training.

Providing the right training is a recurring problem throughout these regions. People not getting the right kind of training in a timely way. Locating the institutions in service targets areas, and inability to be able to deliver the services that were needed associated with that institution. Communication problems, access and transparency, for example. A major problem in the competition area is seen, regular reports on letter accurate that reflect the case adjudication that is taking place, the backlog and the standards that are being used. Feedback systems. That really relates to the next item, also. Public Relations, public affairs, communication ability to build a community support system to assure the effectiveness of these regulatory reforms.

In the case of – I'm using the Romania bankruptcy judge case. We have an interesting situation in capacity building because we had good law. We had statistical reporting that was somewhat all right. We had substantial programs in the substantive training of the syndic judges, but we had major implementations shortfalls, and those shortfalls had to do with the fact that there had been a failure to address the issue of a holistic need of what that judge was all about. He or she was not just a bankruptcy judge in the traditional sense. The individual had to deal with the estate of the bankrupt. The syndic judge had to not only be an administrator, but had to understand accounting, and had to run the business, and at the same time, had to undertake all the other legal work as a judge that he or she was responsible for. That meant that it didn't matter that we had the right laws, that we had the training. The system still was not working the right way.

Audience:

Can I ask a question? I think you identify a lot of correct issues, but I'm wondering if I hear in your description a sense that these are problem areas. If so, I wonder if we should consider whether they are problems, whether it is correct to expect that within five or ten years of reforms, when you identify these shortages or obstacles, you identify cases when they are not met that this is necessarily a problem. Because I think when we advise our clients' states on reforms, the kind of initial perception or set of expectations that we ourselves have, and we pass on to our clients, then generate whether we believe conclusions supporting their finding of success or failure. What I believe is that sometimes it is incorrect to expect some of these reforms to succeed, to take root in five or ten years, and then, therefore, to measure these problems and to reach a conclusion that they have not become necessarily a failure or a problem, may be premature or inaccurate, or maybe I'm wrong. Maybe we should of expected that things would succeed us as they did in some countries in five or ten years. If we are looking at this as a science, maybe it's important to initially develop a set of objectives and criteria by which we then can measure the outcomes.

MARC HERSH

I think you have to look at this in a holistic sense. You're talking about not just saying, well, we have a framework, we have the implementing institution. The bigger issue is getting this system to work, and not sitting back on our laurels and saying, well, it will take five years or ten years, but to go back and analyze exactly and come to an understanding of what is it about the change management system that we're all here in this room trying to undertake in international legal regulatory reform. What is it that is missing that might facilitate this successful conclusion so the system is working. There is no silver bullet as Mark Belcher said earlier this morning. But I think what we're trying to address, what I'm trying to address here is an understanding of trying to come to terms with the fact that there may be better ways, better methods that we can use and that we really have to understand that there may be some missing steps in our assistance initiatives.

Audience (Gennady Pilch):

I agree with everything you've said. In fact, I think the link to effective implementation is critical, and maybe in that sense I would even emphasize that we might not want to think about generation one, two or three, because to me, from generation one we should be thinking about implementation. This is not something that as with a child you think only when one reaches maturity do you then begin to concentrate on certain issues. When you begin to advise any one on law reform, implementation and enforcement should be your generation one set of issues. But maybe I didn't explain myself clearly. I agree that this analysis and assessment is needed, but I think that when we talk about law reform in countries that start from scratch or from a negative, perhaps it is important – not in order to ignore a problem or congratulate ourselves on successes, but to have realistic expectations, to in the beginning develop some realistic measurements and time framework with which we will work and by which we will judge whether our countries succeed or not. I think maybe it was unrealistic to expect that with the enactment of 55 laws and policy pronouncements saying that now Ukraine is a market-reform oriented country that if those goals were not met in two years, therefore there is a problem. So, I

think as legal reform scientists, if we want to call ourselves that, we may want to realistically base the experience to date, come up with a time framework by which these countries or the next countries undertake these or next stage of reforms, could measure their own success. Because I think if you develop a car, a new model of a car in the United States, you don't expect that this model will be designed, developed and become a success in six months. So when it doesn't achieve that goal in six months, you don't say that this is a problem. Well, we're trying to do something much more complex, something that is rooted in culture, history, economic and political situations in any one of these countries. So I sense that even in the World Bank where I work that some of our four-year, or five-year project goals are too unrealistic when it comes to law reform or judicial reform activities. It is very different to build a dam or bridge and treat that project as a success or failure, and in a law reform activity I think we are bound to these same short timeframes that I think are not appropriate for this particular subject matter.

Audience (Jim Neely):

I just wanted to agree with **Gennady** that this is a key point. The kind of stuff we're doing is going to take a couple of generations to do, and yet, USAID is expecting to see short term results in a year or so. Three years ago or two years ago, **Brian Atwood** said we were going to be out of the former Soviet Union by the year 2000. This is the kind of expectational timeframe that is not realistic. You design a program one way if you expect to get something out of it in a year or two. It seems to me that we should be designing programs so that we're hoping to have something come out of it in a generation, and maybe solve it in two. And you look for different things when you do that. I think that's a key point. I completely agree with Gennady that our timeframe is out of whack.

Audience:

Can I just add to what you're saying? All we need to do is turn in and look at ourselves and what's happening to the United States or Western Europe. In terms of understanding that the long-term evolution of our own legal system and the securities therein. How long has it been since we've had major legislation. It was really in the 1930's that we first introduced it. It has continued to be refined. The SRO initiatives are relatively recent in terms of having the stock exchanges themselves participate in this effort. So, it has been a long-term evolutionary period and the expectation that these countries could leap frog from where they were means that we're basically ignoring our own history.

Audience:

So expectations, I think, obviously are key. We're not tinkering at the margins. We're changing fundamental rules of the road, if you will, at how a society's organized from the standpoint of economic activity.

Audience (Igor Kavass):

Jim Neeley probably will be surprised because we've had many conversations on this subject. I think that we are looking here at certain specific issues. We're not looking at a broad culture. We're not looking at changing a society. We are looking at a set of rules that we expect the country to be able to implement in an economic system if they want to play according to what today is considered customary as a standard in international trade, and nothing else. We're not looking at whether they have a single code or not. That doesn't even matter. What we're looking at here is, can somebody trade properly in that country and have normal expectations. But go to a bank and buy money from that bank or credit. It's as simple as that. There's nothing obscure about commercial transactions. They're only obscure to people who haven't been handling them. But for people who are in it, they know very well what they are. This is all that is being asked. Maybe when we ask, and when I say we, I mean the people from outside to come to these host countries and ask. Maybe we do not ask them these questions properly. Maybe we are too broad in what we ask from them. But in the country it's very, very simple what he wants. These are [to trade and borrow]. And for a country to be able to say now that we are not able to do this for one reason or another, it's definitely a problem, not just a dialectic problem, but a very practical problem for that country, for the people who are in that country, and for any international participants. And I thought that this is what we began, and then I saw that you were too easily giving away that particular crown. I would not be happy if we put in Ukraine, for example, say, don't worry if one cannot use a credit card in Ukraine, that's no problem. Of course it's a problem. It's a damn big problem.

Audience (Gennady Pilch):

I think, once again, that maybe my comments were misunderstood. I don't think I'm saying we should have a separate set of rules for these countries or excuse them from non-performance. I think the objectives we all agree with. The question is, what are the realistic measurements and the timeframe by which these objectives can be met. And Igor, I ask you how long has it taken the United States to adopt the metric system? [There has been a program in place for 20 years and they have not be able to] convert over because of cultural, traditional and other reasons.

Audience (Igor Kavass):

I don't think the United States needs to adopt the metric system.

MARK BELCHER:

First of all, I just felt this great weight lift off my shoulders, and I'm sure my colleagues did too. We gotcha. How long we keep you is another issue. You presaged a few of these issues here. Let me try to wrap this package together, and maybe we can get a little coherence here, from a conceptual standpoint. Jerry talked about the first generation. We use generation very loosely as a term. And I don't want you to interpret it too literally, as something that

happened and then only after that, as Gennady said, then you do the next thing. But we needed a way to simplify experience to date. And first generation if you think about it is just, focus on the law. Get the law passed. And that's good, and it's a necessary but not a sufficient step. So we get a great bankruptcy law, or a great competition law. Hurrah! We check the box and move on. But all of a sudden our master said, well, wait a second. There's no competition here. Why is it that you can't get a good hotel room in Kiev, for example? The key here is that if the law is nice, it's good. We can have something that is a shining example of international best practices. Big deal. Okay, what's the problem, and we started focusing on capacity. And we said, all right, they need computers, they need training, they need to have more phones and faxes, all of which is true. And so we go in and get them the computers and the phones and the faxes and we teach bankruptcy judges about the law that they're supposed to implement, and we're left with a big, silent thud. I'm not saying these things aren't important. But what we did in the beginning here, is we started saying, wait a second, is there something missing?

Why is it that we do perfectly good law and we do some really fine training and boom, we have this thud. And this is the implementation and enforcement gap. The first and second generations then are focus areas. You can have a second generation before a first generation, you can have a first generation, and then later have another first generation. Take for example, the United States' Uniform Commercial Code, a perfectly good set of rules. All of a sudden the Internet comes along. All of a sudden people say they want to do business over the Internet, and how am I going to know if a contract is valid. So a perfectly good set of laws on day one becomes outdated on day two, and so we develop a set of rules governing electronic signature. That would be an example of a first generation activity, even though we had a good law then. So don't think of this in the linear, literal sense, but just as a shorthand way of saying what is the primary focus. Now, I'll talk about the market. I'm going to go into greater detail in a minute.

The third generation focuses on that something in the middle, the glue, that dark matter of the universe that our physicists are always looking for to explain why everything works the way it does. We're looking for dark matter. We're saying, wait a minute. You have a great law, and you have some pretty darn smart judges who are really trying. Why is it that the two aren't coming together for implementation enforcement? This is what we are referring to as the third generation. Again, with all humility here, it's just shorthand. Is there a new way to look at the problem and think about the problem that will help us understand why in one case this law and these institutions are working. Because we know in many developed countries they work pretty darn well. Why in a transition country don't they work and can we just dismiss it as a cultural difference? Can we simply dismiss it as they're not smart. Can we dismiss it as they don't have the money. I think those are all cop-outs. And really what we're trying to do is understand, wait a minute, what is that dark matter that makes things work. That again is another key goal here. If we come away thinking like third generation C-LIR people, then we've accomplished our goals.

So we talked about three generations, three different basic ways of thinking in approaching the problem. Now in answering this question, we said, okay, what do you look at? And obviously, we're going to look at the framework law. What's the basic, legal set of rules?

Is that in place? Does it work? Second, what is the status of the implementing institution, that body primarily responsible for getting the job done. Are there other players?

JERRY ZARR:

I'm going to be real brief. I going to talk about the framework law a little more. In your book there is a definition of the framework law, and it's very simple. You will notice that it includes implementing regulations. What we call the framework law basically includes the necessary regulations. To give you an example, if you're talking about the framework law, *per se*, company law in Kazakhstan, it would include the Limited Liability Company's Act that was passed in 1998, the Joint Stock Company's Law that was also passed in 1998, the Presidential Decree on State Registration of Legal Entities that was passed in 1995 and amended through 1997, and then Applicable Provisions of the Civil Code. So, basically it is an example of the totality of those laws and regulations that are necessary for our analysis as a framework law. Now tomorrow I'm going to cover three things that are related: factors that weaken framework laws, the sources of framework laws, and one of the elements of a good framework law. And basically following up on Gennady's point which is so right. One must aim for implementation when one passes a law. And one must consider the cost benefit analysis, and what is the law or regulation going to cost. All of these points are going to be made clear at the discussion tomorrow. And probably just to keep it quick, I didn't mention that point in the earlier discussion.

I thought I would just say a word about a big theoretical, or a big philosophical disagreement on the substantive aspects of framework laws. And that is, we know that a law, when adopted, should be stable, have continuity and have full authority, versus the idea of pursuing an ad hoc piece-meal approach to the law. I thought I would just say a few words to illustrate that point, using the example of China.

Up to 1978, China didn't really – it wasn't a question of the law withering away, there was no law really to wither. In 1978 when China embarked upon its reform, although they recognized that laws should be stable and have continuity, there was a decision to use an ad hoc piecemeal approach to framework laws made at the highest level. And Deng Xiaoping, in a speech in 1978, said, "there's a lot of legislative work to do. We do not have enough trained people. Therefore, legal provisions will inevitably be rough to start with, then be gradually improved upon. Some laws and statutes can be tried out in particular localities and later enacted nationally after experience has been evaluated and improvements have been made. In terms of revision and supplementation of law, once one provision is ripe it should be revised and supplemented, we should not wait for a complete set of equipment. In short, it is better to have some laws than none, and better to have them sooner than later." And basically in China, this policy lasted for 14 years.

It was not until 1992 that China came out of the closet. The Communist Party adopted this concept to socialist market economy. And for the first time in China there was a clear use of terms, which before had been swept under the rug. The Chinese said every country borrows

from everyone else in laws, and we don't have to feel guilty or have subterfuge about acknowledging that. There has been a credible burst of first generation, legal framework-type activity in China over the last four or five years. The Company Law , 1993, the Arbitration Code, 1994, the Securities Law, '95, the Commercial Banks,'95, Accounting, '95, and so on. But I think China gives a very clear example of a country that said, listen, we're going to take the ad hoc piecemeal approach to framework laws. We've got to do it and we're not going to stick with it forever, and then we're going to abandon it and then go right into coherence, stability and authority.

I'm going to stop on that. I know there are other people who will be talking, but that was my schpiel on framework laws.

MARC HERSH:

It is my understanding that a good deal of what happened in terms of framework law development in China in the recent past is the result of the tremendous amount of economic development that has taken place. So it really was the market economy developing there that was the driver for this. Before that during the Deng period you had a tremendous diversity geographically in terms of economic means, and it was a much more difficult situation in terms of governing than they have today.

JERRY ZARR:

Without that economic activity maybe they would still be following the piecemeal ad hoc approach which they abandoned in '92.

MARC HERSH:

[Let's talk] about implementing institutions. Implementing institutions fall into the second category of the four dimensions of reform. We are defining implementing institutions as governmental, quasi-governmental, or private institutions that have vested in them the principal legal mandate to implement, administer, interpret or enforce framework laws. For example, bankruptcy, the collateral registry, etc.

In our four-country survey, we collected information about both the institutional capacity of the primary implementing bodies and individual capacity to the extent that cross-comparison data was available. This was, as I think Mark alluded to earlier this morning, a problem in many instances. The data simply wasn't available. The data was excellent, relatively good in Poland. In Romania there were some major shortfalls, and in Kazakhstan and Ukraine it simply didn't exist in many instances, or wasn't available to us. One could argue if it wasn't available, it didn't count for our purposes

There is a major issue that we note in this. There's tremendous diversity in the implementing institutions and therefore it makes comparison very difficult, unless one is very narrow in one's definition of what implementing one wants to focus in on.

I took as an example, if you take a foreign direct investment area in terms of implementing institutions in the case of Poland, we came up with ten different implementing institutions depending on the kind of foreign direct investment that was involved. It is probably the most complex situation context and one could have found, but it does illustrate the point that it's difficult to do these comparisons in a meaningful way.

One of the things we undertook in our analysis in this area was to try to come up with some consistency in terms of what we were looking at in our diagnostic profiling. I put down a list here. The presence -- in terms of the implementing institution -- is it established and operating effectively; is there a clear mandate that has been defined; is there consensus regarding functions and the role of the institutions; is there support, both on the governmental level and in terms the market; is the structure in place to assure that the implementing institution can be effective. Some of the issues that we talked about before in terms of the training of the staff and the competency. So in fact it is an effective implementing institution. And finally, the functional issues associated with running an implementing institution. In any case, again, these were the common themes we were looking for in terms of our diagnostic analysis.

2. Panel Review of Breakout Group Findings

ALEXANDER SHAPLEIGH:

I had an opportunity to go around to each of the groups and I think that the discussions were right on target, and I think that there were a lot of commonalties that all the groups talked about when I was going from room to room. We'll just go in order that's on the agenda, and Jim Neeley, if you would start.

JIM NEELEY:

We have a number of comments that I will try to characterize. We thought that some of the questions were redundant. For example, looking at the A1 Bankruptcy Legal Framework, question #4 and question #19 are identical, and yet the ratings are different. Question #1, we thought was a summation of all of the others, and therefore that made it redundant.

There is also an issue of weightings. Some of these are really minor. Some of them are critical and yet all of them are rating 10. We thought that people could have worked through a more appropriate rating or altered the number of questions to delete the minor ones or something along that line.

We also had some thoughts on the normative issue that Mark Belcher raised. It seemed to us that a lot of these things had to get into normative issues. For example, question #1, a framework, a law of national application is in place. If you're going to be non-normative on that, the answer has to either be one or 10, nothing in between. Either you have it or you don't.

We also thought that there was some lack of clarity on some of these things. For example, the reference to emerging international standards in bankruptcy, we're not sure that there are any emerging international standards other than the proclivity of country's who had heretofore had liquidation systems to switch to the American reorganization systems.

We thought that some key areas, particularly in implementing institutions, were missing, such as whether or not there's an institutional mechanism to recover assets that have strayed out of, what I'll call in American terminology, the bankrupt estate. In here, there are a lot of questions about the consensus of opinion, which again gets into this normative distinction, although I frankly think that trying to stay away making normative judgements, is like trying to achieve objective history. It can't be done.

We also saw some things could be added here – judicial independence and judicial financing issues that effect the functioning of the implementing institution in the rule of law sense. In this particular one, in supporting institutions, the first 13 questions deal with the courts. The courts are the implementing institutions in this case, not the supporting institutions.

Apparently we were told that there was an effort to have the demand side questions the same for all of the subject matter areas, and we disagreed with that. We thought that the demand questions should be specific to the subject matter area, rather than generic.

We also had some questions about relevance. For example, in bankruptcy systems we didn't see the relevance of whether or not there's a freely convertible currency, like, so what.

SHAPLEIGH:

With all these indicators, if we can make these modifications, do you think that they'd be suitable for bankruptcy, and is there a buy-in, so to speak, into this idea of the market concept.

JIM NEELEY:

Our overall feeling on this was that these indicators are like definitions in writing a contract. A lot of work needs to be paid to getting those right. We thought that these could have benefited from a good bit of additional work. As an overall matter, sure, you've got to have something like this in order to do an assessment like this.

Let me just make one comment. It just didn't occur to me before, but in here the sections of this dealing with the implementing institutions and the supporting institutions. The question is whether or not there should be two categories, or whether that should just be institutions. Some of the confusion about where the courts go and what have you, would be helped by listing in here what the implementing institutions and the supporting institutions are. They're on those slides that we saw earlier today, but they're not in here, not any place that I've noticed.

MARK BELCHER:

We had a big, long debate about whether we should have implementing and supporting institutions lumped together, because in certain areas it's really hard to say precisely, well, what do we talk about in supporting institutions. Ultimately the decision was to stay the course and keep them separately, because, again this is rather experimental. We didn't know where we were going to come out. I personally have become convinced that it's good to separate them because they play different roles. It's one thing to have a court doing its thing in terms of implementing, it's another, for example, to have a bar association or a chamber of commerce, or a university advocating for a change. And this really comes out in the demand area, but also with supply. In Poland, for example, the academics are frequently called upon to give advice on subject specific legislation. I think that if there's an area where we need to develop our thinking more completely is, what is a supporting institution, what is the function and role. . . . Notaries, for example, play a role in several of these areas. They're critical, but then again, how relevant are they going to be? Do they have the same relevance in each area, the same weights. And that comes to a very important point I'm trying to make, is that we intentionally said we're not going to come in and do the weights – everything's going to get a 10, right off the bat, even though we

know some of these things are tiny, some of them are huge in terms of their importance. When you're going through this, you think, wow, this really is important.

Then we would really welcome the benefit from your advice about this –this should be 100 and this should be zero. So, over time our goal is to -- maybe the framework will represent 25% of these four dimensions. Maybe we'll put a lot of weight on the market, and some weight on implementing, and more weight on supporting. So, that's something that is a very good point. As we go forward, we have to think about how do we do that, so that the end result isn't the story. But that's normative, too.

YAIR BARANES:

The first comment we all made is that this study is very useful. It's very useful for me, for example. I'm in Albania. I wish I had it a year ago when we started with the legal framework work. Fortunately, I have it now when we move on to implementation. It will be very helpful. People ask me in Albania, what happens in other places, how can we do things better. And this is the kind of information you can give them. You can give them details about political considerations of a legal system, etc. It is very helpful. However, in my comments now, I will be critical to try and improve some of the things we have identified. I will basically follow the same methodology that we used for bankruptcy. We didn't have enough time to go through every indicator, so some of my comments might be redundant, some of them might be incomplete.

The first thing we found is that, again, in collateral, there was one irrelevant indicator. We all agreed on it. I think #1 is not really relevant for collateral law. If creditors rely on personal guarantees or bank guarantees, by definition, they put more weight on non-collateral guarantees. And we are looking for collateral law that deals with security by using the collateral. The second type of problem that we found in the some of the indicators, and that perhaps is the only problem that cannot be remedied by changing the indicators without going back to the field, is that some of them are incomplete. Look at the legal framework of collateral, #2. Law recognizes non-possessive pledging tangibles. What about intangibles? Intangibles are probably the most important assets for many business people. They include accounts, receivables. Those are a very valuable kind of assets that business people have. There was another example of that in B2, #12, and that's the familiarity of the registry staff with the work and the regulations. Again. it might be included somewhere but, from the brief reading we did, we couldn't find it.

Again, not all the indicators are of the same value. Under collateral law, for example, item #3 in the legal framework of collateral, very important, as opposed to some other ones that are less important.

There is also some problem with clarity of some indicators. What does flexibility mean? And that might be just our reading. Flexibility in legal framework of collateral, indicator #4, allows flexibility in the type of security interest created. That could be very important, if this includes the conceptual unity of the law, which includes any type of security interest, whether

it's condition of a sale agreement, or pledges, etc. It's wasn't quite clear what flexibility means. It might mean something else.

There was some redundancy in some of the indicators, for example, #3 and #9 of legal framework of collateral. I'm focusing right now on legal framework. Number 7 and #10 seems to have some overlap, at least, to some extent. There was one item missing in the collateral, part one, the legal framework, and this is the consistency with other legislation – national and international legislation that deals with security interests. In Albania we have a special chapter in the new law that passed in Albania about making sure that there is no conflict of laws issues when property moves across the border or overseas. So that's important too, because some properties are highly mobile – airplanes, ships and cars. Creditors are concerned about recognition of their interests in other jurisdictions and vice versa.

And then, the last point is the rule of law. Does the environment within the particular country that was checked, allow for publications, dissemination of information and opinions, which is, in my opinion, very important, and the group also indicated that. Particularly education is the infrastructure for sustainability in law schools and magistrate schools that will allow for judges in the future to make the right decisions and lawyers to draw up security agreements that are according to the law.

I think that's it. I took more than five minutes. I apologize.

ALEXANDER SHAPLEIGH:

Well, thank you. There are some themes that are emerging, obviously, in terms of weighting, clarity, redundancy, etc. Rather than have any feedback right now, why don't we just go through them as quickly as possible. Company & Contract given by Anita Ramasastry is next.

ANITA RAMASASTRY:

We were a very cozy group of three for most the session, and were actually the youngest members of the group sitting around together. What that means, I don't know. Very briefly, we talked about both company law and contract law, and the first conclusion we reached was that similarly we felt some of the indicators should be more tailored to the topic, specifically with respect to demand, as well as supporting and implementing institutions. We also felt again that there was repetition in the questions. For example, with company law there were questions 10 and 11 which asked about whether there is appropriate opportunity to comment. I noticed in regulations with respect to market, and these questions seemed to be repeated through each of the sections with the same score given, so the questions are not only generic, but the scoring is generic as well. And the question is, how does that impact the score in particular subject areas. So if there are questions that cut across categories, maybe they should be either carved out and used in a different way, or again, tailored and rewritten.

We thought the accounting and auditing topic might be expanded in a company law section with respect to supporting institutions. We had a general discussion of the concept of self-governance. With respect to contract law, the notion of standardization, and with company law the idea of self regulation and corporate charters. And questions could perhaps be added to deal with self-governance in the market section, because we felt that again the demand and also the supply are both met through the private sector itself. Voluntary compliance was a similar issue that we discussed.

We felt, again, weighting was something that needed to be considered, and that each question didn't have the same weight. Again, for some questions, a yes-no should mean either a 10 or a zero. For example, with company law at the very end of the implementation section, for framework section, there were discussions of fiduciary director duties and also minority shareholders' rights. Those questions seemed to have almost sub-parts to them, where if there were a variety of duties that were recognized in law, or minority of shareholders had a series of rights that more points would be awarded to the country for that. If those questions could somehow be distinguished from the simple yes-no, that would be helpful. So just general weighting.

In terms of supporting institutions for contract law, there could be further expansion. There's mention of notaries, but there really aren't additional questions dealing with the bar and with, for example, creation of alternative dispute resolution mechanisms and private means of law enforcement which seem to be very important, especially in the contract area. And **Fianna**, actually you made an interesting comment about the one shareholder, one vote.

FIANNA JESOVER:

What is this principle really based on, what does it imply, and how did you decide on this as opposed to other methods. We made reference to this principle of voting in other countries. I'm just wondering how it came about, that you decided to use this measure.

ANITA RAMASASTRY:

That was it really – accounting and auditing, increased discussion of self-governance, especially within the demand section, more tailoring of the demand market questions, removal of repetitive questions or tailoring, and then just a focus on the weighting, were the main things we discussed.

ALEXANDER SHAPLEIGH:

I wanted to request that the facilitators from each group also work with the rapporteurs and perhaps write up something, about a page or so, containing these critiques so that we have a record of them, and then get back to cranking at these indicators that we can refine them. I think that a big, tough nugget that we're going to face however, quite clearly, is going to be weighting.

Whether one question should count three times as much as another – I don't know how we do that. With these things we just muddle through them, and it's as much an art as a science.

WADE CHANNELL:

Some people noted that they didn't have time to go through them but they wanted to. We would be very happy to receive your comments on specific things, if it's just a matter of photocopying and send it to us. The purpose of the review is to improve the product. You are the ones who will help us do that.

SHAPLEIGH:

I really prefer, though, getting something by the end of the workshop, because everybody has very busy schedules. It's tough enough just to get away for a couple of days. Jim. Okay, let's move on.

JIM HAMILL:

Among our obligations is an obvious one, which is, how do the legal situations for each of these commercial law fields affect the other. In other words, a good competition policy depends on a good bankruptcy law, a good contract law, and a good international trade policy. It seems an obvious opportunity to look at the combination of civil, criminal and administrative law as it operates in the country as it creates a nurturing or not so nurturing environment to develop the goals of the law. To break down that question into seven different analyses in seven different fields is not as effective, I think, as taking the issue head-on. On the other hand, I don't know how you can solve all of that problem. We also had some general process questions, that the whole study was based on interviews.

Harold wrote the conclusion and I'm speaking for Joe Philips of OECD who we trained at the FTC. And we have come increasingly to the view, after looking at cases for a long time, that it is the unique feature of these laws that allows them to go after anti-competitive government regulations. It shows that it holds the greatest benefits potential for other assistance work. You see that in emerging industry, like telecommunications, where you come up and regulation of new technologies in connection with governmental entities that protect their existing monopoly extension. But in Russia, for example, any monopoly ministries challenging the legality of those actions to the Government. This is a feature you don't have in American law, and it is a feature I think that is a good groundwork for future assistance in the competition field.

ALEXANDER SHAPLEIGH:

Just for me to better understand the point that you're making. Are you saying that the regulatory bodies in a lot of these countries, then, become captives to the industry, and so they don't effectively regulate them, and so, it's incumbent on the anti-monopoly?

JIM HAMILL:

What I'm saying is that the anti-monopoly jurisdiction in most of these countries extends to all but some protective regular monopolies – cable television, cell phones – these are all unregulated areas that are nevertheless being closed up by government entities allied with industry. It holds the best potential for consumer benefit, it holds the potential for trade policy, it holds potential for globalization of trade.

ALEXANDER SHAPLEIGH:

Well, thank you. – Joe?

JOE PHILLIPS:

We support the idea of these indicators being a useful tool. Obviously they need some work, and we can send in some written suggestions after. These indicators are good as far as they go. [comments lost due to recording quality]

Just a thought about the supporting institutions, there's a question about whether you identify several supporting institutions for competition policy. It might be the courts, the prosecutor's office, central regulatory agency, and you do a diagnostic for each of them. It's not just one diagnostic. They're different institutions with different problems.

There's one other thing – what the scale? What grade? In competition policy, I would say there are different standards for developing, or transition, versus development. It's a uniform scale.

IGOR KAVASS:

The sections overlap. We'll do both, investments and trade together. And with the permission of the members of my group, I should perhaps begin by saying that both investment and trade are much broader topics than any of the others, which have certain specificity about them. But both in investment and in trade there are at least different, easily identifiable topics of their own. In investment as it has been pointed out, for example, if you look at it from the point of view of the investor, it incorporates many different areas of law. In trade, WTO alone, there are 20 separate topics that have nothing to do with one another, and they range from customs all the way to intellectual property. So consequently these circumstances we did not look at the indicators in detail. Indeed, I think we were not prepared to look at them in detail, because they are, generally speaking, some of them are particular, most of them are broad themselves in those areas. Sometimes it's difficult to discern between one and the other.

In general, we agreed, all of us, unanimously agreed with the conclusions of the report in these two areas. We thought that we would rate the country in the same way in both of those areas. We found, however, that in some of the answers, perhaps the _____ of the total

amount of information, was too slow in order to give a meaningful score. Either the answers should be discounted or perhaps the investigation should have gone deeper. We found, very strongly, I think, all of us that there are certainly the various issues, the various indicators were measurable. I think we all agreed with all fairness that they are not quantifiable, and that consequently some other scoring should apply to them rather than numbers, and more particularly, percentages, which they claim the wrong impression that this is very precise and accurate. Whereas, in fact, the indicators are simply comparatively weighted whatever the feeling might be generally on this particular issue. So, we thought that this was very important.

We also felt that in some circumstances it would have been better if there had been a more detailed, narrative description, rather than indicators, more depth. But then, again, I have to mention to you that, to remind you, that the two areas, both investment and trade, have such a very broad and therefore the conclusions were frequently broad and the examples perhaps more anecdotal.

We had very seriously considered the question about whether or not the indicators and the conclusions in themselves were adequate for purposes of the report, whatever the purposes may be, and that their causes should have been addressed, too. Because in some cases the causes might have been more important than comparing even one result to another.

ALEXANDER SHAPLEIGH:

Can you just explain a little bit about what you mean by causes. The causes for what?

IGOR KAVASS:

For example, the conclusion was, let's say, customs didn't operate, didn't function very well. Perhaps valuable also is to examine in the circumstances why this is happening, what are the reasons for this? Otherwise, we were being led to sort of wrong information, but we would not be able to determine why one country goes this way and another country goes another. We are aware, of course, that this is a very difficult job to do, and might require much more time and effort. But I think as a group we also agreed that this might be worthwhile to pursue. We, like all the other groups, I think, we agreed that in some cases scores are not of equal value. Especially again, in this area where some questions were very specific – are you a member of WTO or not? Where again, 10 or 0 would be answer, you couldn't have four or five. The other question would be very, very broad about what is your feeling on the investment climate. Secondly, perhaps some of the indicators were repetitive. But I think other groups mentioned that.

Audience:

I have three questions that may have been asked, given the fact that there's much fluidity in the foreign investment climate. One question could have been the complementarity of the

foreign investment law, the framework law with all of the other commercial laws. How do they complement each other? Are there, for example, conflicts between the foreign investment law, and we found there are in investment studies, that there were in some countries, conflicts between the investment law and, let's say, the foreign exchange law.

Is the content of the foreign investment law or framework law adequate? For instance, what is the status of debt? Today, you have large infrastructure projects with large debt components, not only sponsors coming in liquid equity but also large debt components. What is the status of contracts between some sovereigns and foreign investors? That's a question that will come up very regularly in these days, because, for example, in power and infrastructure projects, most of the takers, the power sector is, for example, the Tanzania electrical authority is that a wholly-owned government organization which can bind the central government. Or the PCC in China, for example, provides the coal for a power plant, is the wholly owned government organization that can bind the government.

Number 18, F1 says laws and regulations freely allow for off-shore transfer of revenues realized from investment all scored tens. But other currencies -- are these currencies freely convertible, from the standpoint of the international monetary fund, which says that if you subscribe to Article 8 of the International Monetary Fund's Article, then you ought to allow both from the current account and capital account free transfer. That's about all I had to say – pardon for me for that last point that I made.

ALEXANDER SHAPLEIGH:

Well, thank you very much. I'd just like to repeat the request that the facilitators work with the reporters and the people that presented ideas on the indicators, to please produce some written document by the end of the workshop. We would welcome any follow-up or lengthier reports that you might want to send in to us concerning the indicators.

Panel:

There was a question that came up about C-LIR -- the binary nature. There was either a law or there was not a law, and I wanted to address that. We did discuss this a great deal among ourselves, and you take something such as Romania where there was no collateral law when we were there, there still is none. That would have gotten a zero but for the fact that we were able to modify ways by which using the old commercial code from the 19th Century that they were able to pack together deals, and therefore, there was no specific law there, but there was a system of law. And in those instances we get a low score, but we get something more than zero.

B. Plenary Review of Topical Breakout Sessions

1. Session 2B: Must Harmonization Flow from Globalization?

NICHOLAS KLISSAS:

Ladies and Gentlemen, welcome back. Right now what we intend is to have the reporters from each of the breakout groups make just a brief report on what happened and what the important issues, points of agreement were in their breakout discussion groups. I think I'm going to leave it open as to whether people want to speak from their chairs or whether they'd like to come up and share the podium with us. I guess people want to stay back.

I think what we'll do is we'll start with Group 4. Group 4 dealt with Gravitational Pull – Can Exogenous Forces be Harnessed to Drive Commercial Law Reform? Gennady was elected to do this.

GENNADY PILCH:

Our topic, if I could paraphrase it was, at least the way I understood it, what is the nature, role and impact of external or exogenous forces on commercial, legal development. The purpose of our discussion, maybe of other discussions as well, was to have a dialogue, to have a brainstorm session, and we did have that. I think our discussion was rather theoretical and touched upon a lot of broad issues. I'll try to summarize them.

I would still question or consider what kind of an impact it will have on this particular report of this workshop. But it was a very interesting discussion because we all came from different backgrounds. We all agreed that external forces exist. It is hard to deny the existence of the universe, as such. I see even gravitational pull seems to have cosmic implications. So external forces exist, but we all quickly agreed that they impact internal politics, and therefore, if all politics is local, it's difficult to talk about external forces without immediately looking at what happens within each particular country.

So we tried to analyze what kind of external forces and what kind of internal politics exist in order to explain why even some generally accepted good forces, such as membership in the WTO, in EU and even some uniformly or mostly uniformly accepted conditionality that is brought by the IMF and sometimes the World Bank is not equally adopted and is equally successful. We agreed that even with good or generally accepted principles, the principles are not always explained coherently, are not always internally consistent. They're impacted upon by internal politics, which, based on cultural and legal and political elements that each country brings to bear. Also some forces are not immediately clear offer good advice. Even some multilateral agencies may not recommend policies that are equally and uniformly applicable and beneficial for those to whom advice is given. But also external forces include companies, lobby groups, and other more bilateral or unilateral agents that wish to achieve their own internal political agendas. Those forces cannot always be characterized as good, and therefore to ask the

question, why can they not be successful may not be a right question, because it might be best that they fail.

After we examined what were the differences in these external forces and causes, why even include external factors do not equally impact countries that seem to be similarly located and are similar in size or geographical configuration. Poland and Ukraine might be two examples.

We tried to come to an understanding of what was needed to maybe have education where these forces have a positive impact. We both agreed that pressure from the outside is needed. Some members of our group felt that it was very much needed, because if a country is in a very transitional mode, lacks internal coherent, political or legal structure, then external pressures fill the gap and the void that would otherwise be left open or filled with inappropriate internal or external political forces. But it was also agreed that education about the benefits that these external forces would bring to each country was important so that force needed to be complemented by explanation.

Also internal responsibility and pressure were as important as external forces. So, non-governmental organizations and citizens' responsibility for their own political and commercial affairs is something that is often lacking in countries in transition.

We agreed that culture, history and economy cannot be ignored in formulating advice or recommendations, that conceptually accepted, but they must be modified. A very interesting example given by one of our panel members was that Georgia has a wonderful anti-monopoly law and a very impressive anti-monopoly committee. There is one little problem. There is very little work in Georgia for anti-monopoly committee to do, because there are no monopolies in the traditional sense that they need to regulate. So these people try to find work and do find work in other areas. So the applicability of some of this advice in a particular country, has to be modified and has to take into account the local parameters and the time of economic development that this country undergoes or experiences.

The last point our discussion had to do with goals of advice, and forces that exist. We felt if these can be described as goals, that the more harmonized pressures can be, the better. The definitions of terms and explanation of conditionality or forces being imposed upon a country have to be thoroughly explained. There has to be an element of reciprocity that membership, for example, in EU cannot simply open the country's frontiers to outside investors and economic participation, but equally important is the opening of borders by EU, for example, member states to that particular country, and some countries may not be ready to compete with those in the membership. So, it has to be recognized that they may have to pay a heavier price than some other countries, even if they accept a particular advice. Again I speak of EU membership as an example. Reciprocity, complementarity and accounting for local factors were elements that we felt needed to be taken into account.

NICHOLAS KLISSAS:

I propose to just go right off to the next roundtable group, which was Sources of Law - The Scylla & Charybdis of Utilizing Exogenous Models for Reforming Framework Legislation. So who is the rapporteur?

CRISTIANA STOICA:

It is remarkable that you had to change the order. But I believe this is the best order you can have. This is because the source of the law is before the law. I believe it's the right place to discuss about the sources of law here.

In our group, which was not very big as others as far as I understood, but which was very consistent in terms of the final conclusions, we did all right. We have started from defining what is the Scylla & Charybdis, and this was not only from mythology point of view, but in particular from the little point of view. We have observed that actually what is Scylla & Charybdis are the needs on the side when an investor is coming in the country, and the local environment on the other side. How to make the balance between those two points? This was the following group of questions that we tried to analyze and you will see if we analyzed them realistically or not.

Our conclusion was that of course there is a fundamental pressure to legislating a particular model in various countries where there is a tradition or there is no tradition in terms of legislation in a particular area of law. It has been given as example, countries such as Romania, Poland, Czech Republic where there is a tradition, and countries such as Georgia, Kazakhstan where this tradition is not a substantial one and therefore the solutions are different to be taken.

Our first conclusion is that there is no unique model to be followed when we take a law and try to be inspired from it.

Another group of questions were how to make the balance and what to change, how to change and which are the effects of those changes that need to be put in a national legal system. One of the answers was that the normative standards have to be followed but used rather as a guideline than to be imported entirely.

Finally, if they should arrive at a positive compromise, between the needs on the side, and that tradition, the culture, the history and the economic and political specificities that are in every country. So it has been observed that it has to be taken into account, the concepts and the mentality of the local people concerning the best understanding of the needs of a law. Also, to be aware that each of those countries are, at the end of a day, part of the geography and culture of an area that they should not be put aside. This is the case of the countries of Europe, and they cannot deny the fact that they are part of Europe.

So, if you want, these are very short data conclusions of Group 3 and we hope that we have given at least a small answer to what is Scylla & Charybdis.

NICHOLAS KLISSAS:

The next group is Special Interests vs. the Common Good – Does "Demand" for Specific Legislative Action Translate into Effective Commercial Law Reforms?

YAIR BARANES:

Thank you. Let me be even shorter with some of the comments that we have in Group 2. We wanted to answer the question as it is asked. Does demand bring effective commercial law reforms? And the answer we came up with, I think, and I can correct it if I'm wrong, is that, yes, but it's not sufficient. I think we identified an element that comes even before demand, and that is the needs. Sometimes the people or the interested groups who are in needs, they don't really identify what the solution for the needs are. Personally, I faced that in Albania. None of the farmers that I met with told me – they come and tell me they need a new tractor, or fertilizer – they don't tell me we need a new collateral law that has chattel paper in it. I think identifying the needs – that's what the group concluded – is what is more important for bringing legal framework.

Demand can be generated, not necessarily as a precondition for bringing a legislative action. If you identify the needs you start the work with the legislature. Demand can be generated either before or together with the legislative action, or after. Demand is very important for implementation. Demand is particularly important I think that what comes from the discussion for the purpose of implementation, because that's when people really realize that they have their own solutions. That's the indicator that they realize there is a solution for their needs. That's the main thing we were discussing, and that's what I wanted to contribute. Thank you.

NICHOLAS KLISSAS:

Last, but not least, is Group 1: Content & Sequencing – Should Priority be Given to Certain Areas of Commercial Law Reform? If so, which ones and in What Order? I think that was probably the biggest group. I remember that a lot of people wanted to attend that. Who's the reporter for Group 1?

DAVID BERNSTEIN:

I'll ask for help from some of the other people in the group, because I think where it sounds like the others groups reached consensus, we reached just the opposite, which is a clear disagreement in a couple of different areas or a couple of different places. I think the group was presented with a model of what would be a proper sequencing for legal reforms, and then asked to comment and discuss it. I think there was generally a group of people in the room that agreed

with the model that was provided which focused on kind of the fundamental building blocks of commercial law, property law, contract company law. And then flowing from those would be more sophisticated or more detailed legal reform changes. I should also include administration – the administration of the legal system was also in kind of stage one.

But then there was another train of thought which was that we needed to look for opportunities for reform, that there were certain changes that could be made and small developments that could take place, even where there wasn't a clear property law or where it wasn't clear what the form of a company could take. Or the contracting enforcement rules weren't exactly clear. I think we ran head to head with this idea of whether – the principal question was do we follow a set pattern and a set sequence as a rule? And if the country's not ready to move in more or less the order that I think the donors think makes sense, does that we then back off? Or is there another approach to it and do you look for targets of opportunity or your champions for various different changes, and do a competition law because they're privatizing whether the property right is clear or not.

I will say that one of the interesting things I found, even in the fog of the debate, was that when people from the transition countries did describe their legal systems and the sequencing that they took, by and large there was general agreement that in the early 90's as it was presented, property law, company law, contracts, civil code, those changes were all made. What we're now finding is that they were not done complete. The laws aren't perfect, and you need to go back and fix them. I guess one of the practical questions is, how long do you wait for this second, third generation of amendments and changes before you start to work on capital markets, competition, labor, environmental law and things like that. But there was, below the fog of war of words, certainly some agreement that in the early 90's and in the early part of this decade, by and large, similar changes were made.

Please, if somebody else in the group wants to –

BRIAN MURPHY:

I will just amplify one of David's points that I think in the view of Bill Myers, and certainly I share and perhaps others. As David said, you don't usually have the luxury of choice of prioritizing. Look at Ukraine for a moment. Professor Dovgert and others of us would love to have a civil code. That hasn't happened yet. It's been on the front burner of the donor's for a very long time. That doesn't mean we stop what we're doing. We have, if you will, a piecemeal approach to commercial law reform. We have a very advanced law, collateral law. We go where we find receptivity and we don't have the luxury of sitting back in an ivory tower and drawing up a scheme and then following that. If we were to sit back and wait until our prioritization dreams come true, we might be waiting a very long time. We're realists here.

JOE PHILIPS:

Further to that. We did hear one model, I think it was particularly clear from Albania, about an order reform that largely followed the prescription handed out by the moderator. But

there are other models that we didn't hear from. One model that was very successful was Hungary. Where competition law and competition policy were one of the first reforms put in place in the late 1980's. And competition policy and the competition institution guided the rest of the reforms, guided the privatization process, guided the process of regulatory reform. There's a study coming out from the OECD in about six months, that lays out what Hungary did and is exactly in the model that was presented to us, competition policy was the last, it was like the icing on the cake. There's another way of looking at it, you turn around the lens, and it's the first thing you do. And it informs many of your other decisions, about structure of industry, structure of privatization and so on. Thank you.

Audience:

Another issue that was identified in Group 1, was the lack of coordination of foreign aid in terms of having different donors giving different models of laws, lack of harmonization of different laws coming from different expertise.

NICHOLAS KLISSAS:

I can certainly tell you from my experience coordinating with other donors that can be very cumbersome and very difficult. The way many of our institutions are organized, there's no one central point that's in control of commercial legal reform. I think as I mentioned earlier today, this is the first opportunity that we've gotten all of USAID's commercial legal experts from the field and from Washington in one room. And even so, we don't have all of them. There's a couple of big pockets missing. I would just like to – Claudia –

CLAUDIA DUMAS:

Nick, I would just chime in. I think one thing on which we had several points made is important, especially for going forward. I think that there were various comments made expressing concerns . This is well and good that we're looking at the laws, but we also need to look at what's going on in-country. In terms of what does one need to get to actually use the laws, looking just at the laws isn't enough. That point came out several times during the discussions.

NICHOLAS KLISSAS:

This is really a foreshadowing of what will be discussed tomorrow. I think we've been talking about how dynamic commercial, legal and institutional reform is. That it's much more than just a law and something good that's black and white – things on paper. There are other things that are missing from just an analysis of rules and regulations. As you may have read already in the synthesis report, or the people who have attended the Peer Review yesterday, there are certain other dimensions that we will go into – the role of supporting institutions, the role of implementing institutions, and finally a market for commercial legal reform. Our panels will talk about that more tomorrow, and so I'll just leave you with that.

VII. Excerpted Transcripts of Proceedings
B. Plenary Review of Topical Breakout Sessions

B. Plenary Session Review of Topical Breakout Session Findings

2. Session 3B: Strategies for Closing the Implementation Enforcement Gap

ANATOLY DOVGERT (Representing Group 1, Master-Slave Dialectic – Popular Perceptions of the Role of the State in Commercial Life & Their Impact on the Pace & Scope of C-LIR):

Well, thanks very much, Brian. My Father always told me that when you're at a conference to just listen and not talk, because when you talk, sooner or later you will say some stupidity. But today, where the place is so nice and Brian asked me, well, it's your turn now to contribute.

Here is my opinion and my answers related to these questions.

We know that in the transition from Socialism to Capitalism, from centrally-planned to market-based economy, there is always a social cost of the transitions. We say there is a social dimension of a certain adjustment. In the process of growth, it is very natural that, at the very beginning, the growth curve starts to pick down, and then only after that pick up. These social costs are very important, and in the process of transition we try our very best to shorten these social costs. What we can say, if we ask, for instance, the people in the former Soviet countries, well, in some countries they say, about more than 70% of them, they do not care about politics. What they care about is their living conditions. If we ask them, we would say, that sometime they are now worse off, and not better than five years before, or even in some countries, nine years before. And the current production could not reach the previous level, and so and so. And it is very simple to explain, as I told you, that there is always a social cost of transitions and the curve is always low, it's down before getting up.

What is the lesson for that? The lesson for that is the people will look for more prosperous or better living conditions and maybe later more political freedom. A good approach considering transition from centrally-planned economy to market-based economy would be not just attack problems one by one, but, in my opinion, we should adopt these kind of indicators [words lost on tape] approach. This involves at least the following conditions in my opinion, among others.

First the democratization of political institutions should go in pairs and in parallel with market-based restructuring.

The second is that a democratic society and market reform should not stay at the central government level, but also deepen at the local government level, so that the population, the people, can support reform and also can participate in the process of decision-making and can have their voice concerning their future.

The third one is, I think in the meantime, economic growth should be broad-based. That means, it should not be for just the five or ten top persons, but also for the 90 or 95 lower persons. I think that during the transition it is very difficult for us to look at the safety net while we're waiting for the transition to be smoother later.

And the fourth condition, in my opinion, would be the success of reform in the countries. It is not only the task of the efforts of these countries but also the contribution, the assistance of the international community. I would say that the success of a country is a function of government and the people in these countries, but also the effectiveness of the international community of donors and our contribution as a consultant expert to assist in these countries.

To summarize, I'll just say one sentence. The success of economy reform, market reform, can be summarized, based on a saying of one U.S. President that I admire most. He said that, under democratic society, if we cannot save the poor who are the many so that we cannot save the rich who are the few. Thank you very much.

NICHOLAS KLISSAS:

Thank you very much. Group 2 – yes, Mr. Myer.

BILL MYER:

To move things along, I'll just report from here, if that's all right. I was elected rapporteur of Group 2 because I was the one who forgot his nametag.

NICHOLAS KLISSAS:

Group 2 is Technology & Change – Leapfrogging Institutional Barriers to Implementation & Enforcement.

BILL MYER:

I guess the starting point that we came to in our group was that one of the goals in the reform process, among many, is to have a system that is demonstrably fair, and allows the consumers of the system, the commercial law, to believe that the process is, in fact, fair, transparent and just.

We also, to some extent, focused on the issue of internal investment that has been – I won't say ignored -- hasn't been spoken of at the same level as foreign direct investments so far in this course, and talking about how technology can assist in that regard.

One of the things we talked about initially was why we use technology, why technology should be considered as part of an overall commercial law development process. There are a number of reasons.

- One is technology can be used to reduce the opportunities for corruption by reducing the human steps in the process and the opportunities for people to become involved in corrupt activities.
- Second, information can become more widely disseminated, and therefore you get the same answer every time you ask the question, no matter who you ask.
- Third, technology can reduce transaction costs for both internal investors and foreign economic actors.
- Fourth, technology can, even in the commercial law reform area, have a multiplier effect. There were numerous examples discussed. Small spin-off businesses arose from technology-based programs within the region, because, (a) there are a lot of young people who know how

to write code and can start their own small businesses; and (b) it's labor and not capital intensive, and therefore these technological programs provide opportunities for young entrepreneurs.

- Another reason that technology is useful in the process is, it oftentimes forces reconsideration of the processes and procedures that are used in a particular activity, whether that's company registration, the courts, or whatever it might be.
- Finally, technology can be used as an engine for change in and of itself because it oftentimes forces a culture that has never had to communicate before to, in fact, communicate. Once that communication starts, when it breaks down, people will become acclimated to communication and start clamoring for change.

We looked also at the obstacles to technological change in this context and I don't think we came up with anything particularly unique or novel. There are the obvious ones – resources, technology takes money.

There are cultural problems and they were discussed by the prior speakers.

There's computer phobia among many older officials, whether they're western or eastern. We run into that in all countries.

The last one is government reticence because, by increasing technology, you decrease government control over information. And in many structures within the government, again both west and east, there is a desire to maintain control over information to the extent technology is suggested. It's resisted because that loosens the ministry or whatever agencies control information.

We next looked at the question of how to use technology to promote change in the commercial law area. Again, I'm not sure that we came up with any magic or novel solutions. A few that we came up with were the following.

- First we recognized it may in fact be the easiest to do in situations where there are no existing processes or procedures in place. You can put in a technological solution when you are starting a secured pledges system in a country if no secured pledges existed before, because you have fewer obstacles. You don't have to retrain bureaucrats, you don't have to overcome inertia.
- Secondly, and I think this is relatively obvious, it's easier to implement change when you work with younger people because (a) they're more eager for change and (b) they have much greater familiarity with computers and they're not concerned about some of the computer phobia problems.
- Third, technology can be used to promote change by looking for opportunities to involve or interest the private sector. There are a number of areas where the private sector can be an engine for change in the commercial law area by creating technological solutions to problems.
- And the last point, and perhaps the most important, is that it's important to get some national group or agency – I don't want to define it any more narrowly than that -- to take ownership of the project. Technological solutions, fixes that are imposed from the outside seldom work, and they look very nice, and they're very easy to market, but they don't necessarily work.

The last thing we looked at was the role of the donor community, and what the role of the donor should be. To quickly list those:

1. Don't necessarily transplant technology. The technology must be adaptive to specific needs.
2. Work with national groups that will take ownership
3. Look for opportunities at any level where champions exist
4. Don't pursue the most technologically aggressive program. There may be solutions that are less technologically aggressive.
5. The donors need to stay in the background. Let the national proponents take the lead. We need to support agents of change, not get out in front and force change from the outside in a top down manner.

Thank you.

NICHOLAS KLISSAS:

Thank you, Bill. The next group, Group 3, Private Prerogative in the Public Domain.

YAIR BARANES:

I have to share -- it was a very fruitful conversation and discussion. At a certain time, like Bill, we lost track of the focus of our particular topic, so we tended to be more focused on how to solve philosophical problems of the participation of the state in the regulation process of commercial law in general. Still, if I have to report on the particular issues, the first thing we did was we got oriented towards commenting on particular spheres where traditionally activities which are perceived of as pertaining to the public domain have already been introduced. As a result, activities of private bodies, units or whatever you call this. So positive, Bulgarian and Albanian experience was shared concerning the activities of private persons acting as notaries. In both countries there has been a dramatic change with obtaining better service, and maybe to a very great extent, restricting the domain of corruption.

The next view which we were interested to share experience about was private bodies performing public duties which are believed to be pertaining to the public domain was in the process of enforcement of court judgments. A very interesting discussion about the particular ways one such enforcement can occur took place. It was finally generalized that this is a possible thing and it might be certainly very effective not to have the old-fashioned state enforcement officer and to wait for years for the execution of a judgment, but instead of this care, a private company or the creditor himself who of course should act out the supervision of the court. The particular role of the state in the process of carrying out such activity was seen at the level of statutory regulation of the possibility of private bodies or persons to perform execution and enforcement.

Secondly, at the level of licensing of such persons and bodies by the state, and thirdly, the state should participate as a controlling body during the whole process of enforcement.

Here we jump a little bit off from the topic and started talking about the general problems concerning the licensing powers of the state. We stated that there has been a lot of abuse on the part of the states, introducing extensive licensing procedures and regimes.

Another aspect connected with this was the role of international economic institutions and the possible pressure they could exert over national political bodies to either introduce such private forms of activities in the particular domains that were discussed, or to press the governments to restrict the application of licensing regimes and unnecessary bureaucratic burdens.

And then we finally could not avoid a general issue, which is the issue that has been raised around the whole conference so far. This is the issue that each particular result in a particular solution at a different legislative level, if not harmonized with the rest of the legal system in a particular legal system in which it is going to be implemented, there will be an immense gap between implementation and legislative solutions.

Finally we raised the issue of liability and responsibility of such private persons who would act to fulfill traditionally such duties that are traditionally perceived of as state activities.

What we didn't come up to, of course, we spoke about private arbitration and execution of arbitral awards. I think we didn't raise the question about private registries, but we can continue the discussion informally. Thank you very much.

NICHOLAS KLISSAS:

Thank you very much. I just want to mention that these topics are really points of departure for a discussion, and so not necessarily something that we have to slavishly follow. Group 4 – is there – Claudia Dumas.

CLAUDIA DUMAS:

I'm also standing between everybody and lunch, except for the group photograph, so I will try to capture, what is I think with all the other groups, was a very animated discussion. We ran out of time. We could have kept on going quite a bit longer.

The topic for our group was Drivers of Change – Strategies for Promoting Transparency & Accountability in Enforcement of Commercial Laws. Given the themes that we're dealing with, I think much of our discussion really focused not surprisingly on how does one get to implementation of laws, and some of the transparency issues associated with that. I can't say that we came up with a single cohesive strategy, but there were clearly seven or eight themes or concepts that arose during the course of our session.

I think overall, if there's a single theme we recognized that this is a complicated and holistic process. This is not just a matter of what is government doing – that there are multiple actors, that there are multiple points in time.

As a first topic, much of our discussion focused on the legislative process, and how critical that is in getting the implementation and enforcement of laws, that there really does need to be value to a role of having discussion of the purpose of the laws, and understanding of the laws. For implementation issues, identify who was the appropriate body to actually implement a law. Is the law too complex for a given country? In addition, are there local circumstances so a provision that might look fine on a law that's been adaptive from another country, doesn't work for the local conditions. So clearly there's an important set of period of discussion and understanding on the laws.

We got into a fairly animated discussion about the role of international institutions when they imposed conditionality and what impact this has for discussion of laws. We seemed to have some consensus that the impact that has, and if there's a negative impact because the law goes through very quickly may vary with the complexity of the law and the subject matter. In certain areas it may be more critical to take some additional time for discussion. And indeed perhaps it's appropriate for some countries to respond to an international institution and say, look, we have a plan for how we're going to look at this law, for having a discussion regarding the law, for what the cost of the law is for implementation, and then actually proceed a little more deliberatively. But again this will vary by country and will also vary by the subject area.

In connection with the legislative process I would also note that we discussed the fact that rapid amendments and rapid changes to the laws, including by executive decrees, can also have a negative impact and make it much more difficult to implement laws.

There were several additional issues or points that came up after the legislative process. We recognized that when we talk about accountability that payment in civil service reforms, judicial payments, all play critical roles. There's obviously a tension here. How does one build a successful, legal framework and the implementation and the enforcement of that framework when you're still trying to build an economy. There's a little bit of a chicken and an egg, or a catch-22 here. But clearly there are issues that need to be considered and how does one promote accountability when there's a very low level of compensation in the civil service and the judiciary.

Public awareness, as I've noted before, in connection with the legislative process is absolutely critical. This was the general public. This was advocates, jury consultants, really allowing people to be aware of change, the purpose of laws, of successful applications of the laws.

Discretion was another role that we discussed in terms of accountability and transparency that there may be areas where certain authority has discretion, whether it's because there's an unclear mandate or for other reasons, and that one needs to consider appropriate definitions of mandates, whether conflicts of laws create difficulties in terms of getting consistent applications and also situations where there won't be the potential for corruption as a result of unclear discretion and standards.

We had the question raised – what do we do when there's no interest in accountability at a senior government level? Indeed, there could also be issues in the private sector on this one, but what does one do when there are very powerful interests that are not interested in change.

One of the areas that we identified for that was there may be areas where it's appropriate to have decentralization, increase decentralization of authority, local government roles.

Similarly in connection with enforcement of judgments we discussed, what was the role of the private sector, and indeed in connection with the collateral registry. In this case I would allude to Albania having a private operation under government regulations of the collateral registry itself may be a good thing to do.

As a final note, we did consider the fact that we're not looking purely at matters of commercial law. But we also need in some instances to consider the role of criminal law, in certain areas, including banking, financial transactions -- that there are many pieces of the puzzle.

B. Plenary Session Review of Topical Breakout Session Findings

3. Session 4C: Can Market Forces Be Harnessed for Sustainable C-LIR Reform?

NICHOLAS KLISSAS:

It's been a momentous, I think, three days, and we're just getting to the last stretches. I'm going to ask the rapporteurs for each of the groups, to just give us the highlights, and perhaps be mercifully brief. Why don't we do this in the descending order again. So Group 4, Toward Creating a "Virtuous Cycle" of Reform. Who's the person who will give us brief -- yes, Mr. Steve Gonyea.

STEVE GONYEA:

The quick version of the answers to the questions would be yes, no, yes, yes, no. One of the questions asked about whether it's a virtuous cycle -- we debated whether it was virtuous or vicious. We also decided instead of a circle, that it was more of a pendulum. And it comes to my – I remember back in the Medieval Age when those pendulums used to go back and forth over somebody laying on a table, getting ready to be cut in half. I just wonder who would be the people on the table these days.

We felt that the process of legal reform was more of a stop and go motion. The importance that we need to keep in this is that we need to stay engaged. We need to be in this process for the long term. We need to not give up too quickly if we are to achieve our goals of commercial law reform.

Are we market-driven in our support? There was some disagreement, but we come in with what we say they need, but we acknowledge that there is a basic need for commercial law reform in all countries, regardless of whether a government is requesting it specifically or not.

Go slow or fast. We recognize the need for certain law reforms to be done quickly. Others will take time. We feel that donors sometimes have an unrealistic timeline for commercial law reform. Reform must come from a combination of consensus building, as well as working closely with a concentrated group of individuals who are in policymaking positions.

To create market-driven demand amongst the private sector is admittedly difficult. The private sector, we recognize, encompasses a very broad and diverse set of interests, from the large, formerly state-owned enterprises, to small shopkeepers, to foreign investors.

Going back to the concentrated group of policy makers, this can sometimes be a blessing in that law reform can be done very quickly and very easily. Other times it can be a curse where major reform can be blocked.

We need to understand the goals and objectives of the policy makers and of the private sector. While we talk of understanding our counterparts' goals and objectives, we also need to understand the goals and objectives of the donor community that in many cases is lacking. We don't have specific goals and objectives -- exit strategies for our programs.

We consider the political, the development and presentation of a political cost-benefit ratio to be unrealistic. There are far too many unquantifiable factors. It would also be nearly impossible to justify to our counterparts.

Finally, in working with institutions to build a constituency was also regarded as necessary, despite our agreement that these institutions are often captured by particular interests. We can only hope that these interests are supportive to our cause.

NICHOLAS KLISSAS:

I just want to give everybody an opportunity if there's a question or clarification that they'd like to get from Steve's report, please make it now. Otherwise we'll go to Group 3, Top Down vs. Bottom Up/Endogenous vs. Exogenous – Do Integrated Approaches to C-LIR Really Deliver? Who's the person for that?

VERONICA METONIDZE:

It was a very interesting discussion, and for me I was very lucky just to have had participated in the discussion because it was the last day of the seminar when I finally found the area where I could get some help and some support to my commercial law educational program.

We decided answering all these questions, that there was a need of combination of both ways, top down and down top. Which way should be first depends on our appreciation.. If we approach talk down, we should be sure that we'll get the support of the original community and meaning taken into, keeping in our minds that in some countries that they are traditionally taken in their own ways. It is very difficult just take something that comes from abroad and there is some resistance in this way. So we should prepare the people to cooperate with us, and to take advantage of these talk down approaches to the process of legal reform.

There are some very good challenges, strong challenges, with bottom up, because sometimes there is a dialogue between government and big businesses. Small businesses just do not get enough support to develop because they are less powerful, because they have not enough resources. This area of legal reform is just missing in some spots. In this way challenges with bottom up are very strong.

So we agreed that we should use both approaches, top down and bottom up, depending on which sphere or which question is more appropriate. We were also thinking about a philosophical point of view of market economy. We agreed that market economy is not some stable thing. It is more a process which is constantly processed. Contrarily we consider that this

process should be endless. We agreed that there are some guarantees, some framework for a market economy, but we can't consider that if we have this guarantee, we have the market economy working on our countries.

We also spoke about local solutions, and we agreed that all international forces could and should help the local authority, local government design a strategy to deal with them.

When I was speaking about the combination of top down and down top, we should keep in our mind that the combination is with talk from the top level expertise and top down laws. But we also need to educate people from the bottom to have a right understanding of the laws. The process of reform could be more successful, if we elevate them to the level of good understanding laws and the needs for these laws to be implemented.

NICHOLAS KLISSAS:

Thank you very much. Are there any questions or comments from the floor? Otherwise, let's go down to Group 2, Stakeholder Analysis as a Tool for Diagnosis & Intervention in Promoting a Sustainable Market for Commercial Law Reform. David Bernstein is the reporter for the Stakeholders.

DAVID BERNSTEIN:

We covered a lot of ground in the working group and have the benefit of a number of examples from Romania, Macedonia and Georgia to discuss and to use to describe the issue of looking at stakeholders or trying to identify stakeholders for commercial law reform.

The first issue that we covered was the need to recognize that there is such a thing as stakeholder power, and that there are entities and individuals and organizations that can play a role in commercial law reform. However, we also identified a number of problems in identifying the stakeholders and in getting them energized to play a role in the reform process.

The first is just getting them organized. Oftentimes the stakeholders are a diffused group of people.

The second one that was raised were the ghosts of organizations past. If you recall at that meeting that there are hold-over organizations that have reputations from the Communist period, and because of those reputations, they've lost all credibility as a stakeholder or as a potential voice or player in the law reform process. The example given was the role of unions in Georgia, labor unions in Georgia which in the past had played no role as an independent voice, and now workers don't view them as a tool or as a vehicle to get their voice heard in the law reform process.

Another problem was the issue of leadership among the stakeholders, either within the organizations or even among individuals. I called it the need to identify some pillar around which others can organize and can use as the voice. Oftentimes you've got either non-existent

leaders – the people aren't there yet – or you've got leaders that are disconnected to the interests and to the rest of the organization.

One of the big problems that we talked about was the fact that in most of the countries now, the real stakeholders are the public stakeholders. They're the people in the governments, in official organizations. The issue is coordinating between the private stakeholders and the public stakeholders, figuring out a way to bring the two together as a force for reform.

Another problem that came up in identifying stakeholders was that in some areas, particularly in the competition law areas, you get very technical legal reform areas and there are no stakeholders, or at least the stakeholders are all consumers, or all the people in the population. It's very difficult, obviously, to organize them in any fashion.

Lastly, a problem that was brought up was the traditional way of thinking. The view that the government was there to take care of everybody, and therefore there was no reason for individuals to approach the government and play a role in government changes in the drafting of laws and the implementation of laws. That was something the government did. The citizens took the benefit or the cost of the laws and weren't able to have a say. There's an attitude that needs to be overcome, and perhaps we need to think, as donors, of ways to overcome that attitude.

One technique that was talked about – Mark coined the phrase – synergy power. In some of these technical areas you'll get where there are no stakeholders or no easily identifiable stakeholders, an institution or an organization will look for an easy way to score public relations points, or to score interests. The example given was competition authorities will often do consumer protection work which really isn't in their realm of expertise, but they'll take it on because it's a way to generate interest in their institution and in what they're doing.

The last issue we talked about was, once you have the stakeholders, you need a process or procedure so that the stakeholders can play a role. We tried to tease out whether there were procedures, formal procedures, informal procedures, whereby the stakeholders could influence legislation, could influence the drafting process, the legislative approval process in parliaments. There was one example given where in the environmental area in Georgia there were actually procedures put in place to allow for inputs from outside stakeholders. In most other situations, these procedures or processes don't exist. The issue then becomes -- is this an area for donors to tackle head on? Is this an area of administrative law reform that can open the door for stakeholders? It's complicated. It's political, so it has drawbacks. Another alternative way of dealing with this is as we build our projects in specific commercial law reform areas, we, as donors and as project implementers, need to make sure that we bring these stakeholders in, that we include them in our projects. If we're providing legislative assistance or implementing assistance, that we create an open process, even where there's no formal procedure.

And lastly we talked a bit about the role of foreign investors. The EBRD has played a role in forming foreign investment advisory councils that bring together foreign investors, and I think domestic investors at a very level with government officials to discuss the commercial

climate. They're done relatively infrequently at a very high level so they do get the attention of the policy makers, but there's an expense to it, and that's why I don't think it's been duplicated in too many countries. That's it.

NICHOLAS KLISSAS:

Well, thank you. Any questions? Then we'll go onto Group #1, The Distant Neighbors – The Case of Poland and Ukraine. Who is going to speak for that group?

BRIAN MURPHY:

The Anatoly and Brian Show, and I defer to Anatoly.

ANATOLY DOVGERT:

Thank you Brian. First of all, during our discussion we did not invent the bicycle. We confirmed that the history and culture of each country are very important factors in the question of the quality and speed of the developing market economy, including lawmaking and its enforcement. Ukraine and Poland are quite different countries in this respect. They have different historical and cultural heritages before starting reform. The history and culture are very delicate questions. We cannot change here a lot, very quickly, having differing cultural and political and historical heritages.

These countries, Poland and the Ukraine have different results in achieving the final aim, introducing market economy. We cannot change the situation in Ukraine in this respect, if we will talk about the cultural heritage through revolutionary means. We may only do this so through gradual evolution. That is what we should do now, having such bad results in the Ukraine. Of course we cannot stop on this. We should work, take patience and continue to support the big reforms of the market economy in the Ukraine. That's our suggestions.

BRIAN MURPHY:

In one minute I will simply capture the essence of the rest of our discussion. One looks at Poland with its long experience as an industrialized country, its culture of democracy, the rule of law in a market economy, and to date, the socialist time, a strong educational system and, as one wag commented, well, the real reason is we're 80% Roman and 20% Byzantine. The point here is the historical and cultural antecedents are profound. The differences between Poland and Ukraine, despite their geographical proximity, are profound. It all comes down to a sense of what we just termed timing. Poland has had a very long experience with the richness of these factors. Thank you very much.

MARK BELCHER:

I'm going to take issue with this conclusion – for a couple of reasons. I'm not an expert on Ukraine history and I know some here can correct me, but I did do a little study about the economic history and the development of commercial practices in Ukraine prior to the Soviet era. I was surprised, frankly, to learn that starting in the late 1700's and through the 19th Century, a rather sophisticated commercial merchant class evolved primarily around the grain trade. And this was centered in the Ukraine. I'd like you to know that in the early 1800's – 1820', 1830's -- Ukrainians were using factoring, they were using futures in forward contracts, and they were trading on the stock market. They were very sophisticated. They understood the movements of international markets and their impact on the local economy.

I would take a slightly different spin on this. History and culture certainly do matter in the case of Poland and the Ukraine. History and culture certainly are significantly different between these two, and yet, maybe we're looking at the wrong history and culture. I would say that one thing we should consider is that 70 years of Soviet hegemony and the forced collectivization of Ukraine have had a very profound impact on Ukraine today, certainly that's self-evident. But I think it's easy to go from that and say that while Ukrainian's are somehow different. They never had the commercial experience or sophistication of the Poles, and therefore we can explain why the situation is different today. And frankly, I read the history and in light of that I say that I reject that conclusion. I think that's somewhat simplistic, and I think it's a cop-out.

My question is, why is it today, what do we have to do to address the damage that this forced collectivization brought about? Because we know as a fact that Ukrainian's certainly are sophisticated enough to undertake very modern and advanced commercial activities. Thank you.

ANATOLY DOVGERT:

Of course, I have rather another view than Mark. During our discussion I mentioned about the legal sources of the old Ukraine three centuries ago. In Ukraine there was a normative act [tape unclear for the next sentence]. But if we will compare the modern, commercial situation with the situation that was in Ukraine three centuries ago, it is quite different. When we created a legislative base in Ukraine, we took a look back, what that legislation was in independent Ukraine before we were together with Russia. And of course we studied all of these sources of law which were three centuries ago. But unfortunately we cannot use anything from these things. For these three centuries, we forget everything.

Let's take another example -- the people of East Germany. Now if I go into this country, but they were under domination only 40 years, and this country now has a great problem with the cultural heritage of these people. And what we will speak about the Ukraine who have never had its own state, who have never developed legislation. That is why we spoke during our session. Poland had a civil code and commercial code before the World War II. Ukraine had nothing. That is why we are different. We are in a quite different situation now from the historical and

cultural point of view. So, of course, Poland is very successful in this way. It's good because they have a real cultural soul for this. We have none and everyone should understand that we haven't such a soul. I agree that we are a very educated nation. More than 30% of the population have a higher education. Everybody has received a secondary education. We have everything for studying this reform, but the cultural heritage. It's the main obstacle in making progress. So you should understand and be very patient. You should work together with us in developing this process.

NICHOLAS KLISSAS:

What I would like to do is just maybe give you a couple of ideas of where we've come in the last couple of days and where we are going from here. We first came here and talked about the first generation of legal reform. And during that first generation, donors in particular, were very focused on getting the laws just right. Even now, we have model collateral laws. The World Bank is very focused on making sure that bankruptcy laws attain a certain standard, that they contain all the requisite items needed to make those laws effective. What we see here using the indicators in the format that we used with this methodology is that there's a lot more involved in getting a legal regime right, or a legal organism right. Each one of these legal areas that we've looked at, whether it's international trade, collateral law, bankruptcy, it's not just something on paper, and it's not just static. There are people who use them and they have a certain economic effect on society. It affects legal relationships, and it affects peoples' pocket books as well. Standing back, I'm just taken by the fact that for the last day we've been talking about things like the market. And you have been engaged in this conversation intellectually. You haven't said this is just a bunch of baloney, let's get on with this. So I think at least in terms of one of the goals that we had at the outset, I feel like there has been a buy-in by the assembled group into looking at legal regimes in this four-dimensional way.

Going on from that, I want to see if there's – the one answer to all our problems is right here on this slide chart over here. If we can only understand and figure out what it means, I think we won't have any more problems in the future.

I'd like first of all to give a hand to Mark Belcher for the last three days, the perseverance. In addition to Mark, I'd like to recognize Gerry Zarr, Wade Channell, Peter Yanachkov, Marc Hersh. Let us not forget Greg Price who's trying to slip out.

(More Thank You's, etc.)

Regarding next steps. What we intend to do is after we get back to Washington, probably sometime in January, first of all we're going to be looking back over the indicators – that third tier group of scoring and questions and work with people at the EBRD, like Anita, to fine tune those and make those a little bit more refined, more meaningful so that we can meet some of the criticisms and the commentary that we got from people over the course of the last couple of days.

Also, I think we are going to be producing some kind of final report or output from this conference, and we will be sending that to the people who are gathered here today, and also to some of the people at the Missions that couldn't attend. Unfortunately no one from Poland and no one from the Romania Mission cold be here with us today. We still feel that, at least with Romania we have an active course of legal reform program going on over there, and we don't want to let that drop.

Lastly, I would like to propose to some of the AID Missions here that there might be some interest, after we finish revising our indicators, to conduct another diagnostic assessment of a country and see how that will work out. I'm thinking in particular that we haven't done anything in the Caucasus and we haven't done anything with the former Yugoslav State. I think that those are areas that we can discuss further on.